आयकर अपीलीय अधिकरण, अहमदाबाद न्यायपीठ

IN THE INCOME TAX APPELLATE TRIBUNAL, ''B'' BENCH, AHMEDABAD

BEFORE SHRI WASEEM AHMED, ACCOUNTANT MEMBER AND Ms. MADHUMITA ROY, JUDICIAL MEMBER

Sr.No.	IT(SS)A/ITANo.	Asstt. Year	Name of Appellant	Name of Respondent
1-6.	IT(SS) A No.128 to 133/Ahd/2021	2009-10 To 2014-15	A.C.I.T, Central Circle-1(2), Ahmedabad	M/s. Real Marketing Private Limited, 8, Jainam Society, Near Priya Cinema, Krishna N Naroda, Ahmedabad-382346. **PAN : AACCR4046C**
7-8.	IT(SS)A No.181-182/Ahd/2021	2010-11	A.C.I.T, Circle-1(2), Ahmedabad	Neminath Traders Pvt. Ltd., 5-B, Vasupujya Society, Paldi, Ahmedabad-380015. **PAN : AACCN5138M**

(Applicant)		(Responent)

Revenue by	:	Shri Sudhendu Das, CIT. DR
Assessee by	:	Shri Raman Kumar Goyal with Shri Parin Shah, A.Rs

And

Sr.No.	IT(SS)A/ITA No.	Asstt. Year	Name of Appellant	Name of Respondent
9.	ITA No.1501/Ahd/2015	2011-12	M/s. Real Marketing Private Limited, 8, Jainam Society, Near Priya Cinema, Krishna N Naroda, Ahmedabad-382346. **PAN : AACCR4046C**	ITO, Ward-5(3), Ahmedabad

(Applicant)		**(Responent)**

Assessee by	:	Shri Parin Shah, A.R
Revenue by	:	Shri Sudhendu Das, CIT. DR

सुनवाई की तारीख/**Date of Hearing : 22/02/2023**
घोषणा की तारीख /**Date of Pronouncement: 19/05/2023**

आदेश/O R D E R

PER WASEEM AHMED ACCOUNTANT MEMBER:

The above appeals have been filed by the Revenue and the Assessee against the orders of the Ld. Commissioner of Income-Tax (Appeals), Ahmedabad, arising in the matter of the Assessment Order passed u/s 153Ar.w.s.143(3)of the Act Income Tax Act 1961 (here-in-after referred to as "the Act") relevant to the Assessment Years 2009-2010 to 2014-15.Since, the issues involved in all these appeals are identical, we proceed to dispose of all the appeals by way of this common order for the sake of convenience and brevity.

First, we take up **IT(SS)A No. 128/AHD/2021,** an appeal by the Revenue for AY 2009-10 as lead year, in the case of ***Real Marketing Pvt. Ltd.***

2. The Revenue has raised following grounds of appeal:

1. On the facts and in the circumstances of the case and in law, the Id. CIT(A) has erred in deleting the additions made by the AO in the order u/s 143(3) r.w.s 153A on legal grounds that the additions should have been made u/s 153C, without appreciating the fact that provisions of section 153C empowers the Assessing Officer to assess or re-assess the income of the person other than searched person, but the assessee being searched person was squarely covered under section 153A.

2. On the facts and in the circumstances of the case and in law, the Id. CIT(A) has erred in accepting the contention of the assessee that the assessment u/s 153A is to be made solely on the incriminating material found during the search carried out in the case of the concerned assessee and has failed to appreciate that it has added words in Section 153A, which is not permissible in law.

2.1. On the facts and in the circumstances of the case and in law, the Id. CIT(A) has erred in holding that any addition during the assessment u/s.153A has to be confined to the incriminating material found during the course of search u/s.132{1) of the Act, even though, there is no such stipulation in sec.153A of the Act.

2.2. On the facts and in the circumstances of the case and in law, the Id. CIT(A) has erred by not considering the decision of Hon'ble Jurisdiction High Court in its proper perspective in the case of Pr.CIT Vs. Saumya Construction P.Ltd. 387 ITR 529 (Guj), as this judgment lays the principle that assessment should be connected with something found during the search or requisition, viz. incriminating material which reveals undisclosed income. This decision nowhere states that addition u/s 153A can only be made if incriminating material is found during search from the premises of the concerned assessee.

2.3. On the facts and in the circumstances of the case and in law, the Id. CIT(A) has erred in not appreciating that sec.153A requires a notice to be issued requiring the assessee to furnish his return of income in respect of each assessment year falling within six assessment years and to assess or reassess the total income of those six assessment years, and that the scheme of assessment or re-assessment of the total income of a person searched will be brought to naught if no addition is allowed to be made for those six assessment years in the absence of any seized incriminating material.

2.4. On the facts and in the circumstances of the case and in law, the Id. CIT(A) has erred in not appreciating that while computation of undisclosed income of the block period u/s.158BB was to be made on the basis of evidence found as a result of search or requisition of books of accounts, there is no such stipulation in sec.153A and sec.153BI specifically states that the provisions of Chapter-X!V-B, under which sec.158BB falls, would not be applied where a search was initiated u/s.132 after 31/5/2003.

2.5. On the facts and in the circumstances of the case and in law, the id. C1T(A) has erred in not appreciating that assessment in relation to certain issues not related to the search and seizure may arise in any of the said six assessment years after the search u/s.132 is conducted in the case of the assessee, and that if the interpretation of the Id- CIT(A) were to hold it will not be possible to assess such income in the 153A proceedings, while no other parallel proceedings to assess such other income can be initiated, leading to no possibility of assessing such other income, which could not have been the intention of the legislature. Further, the AO is duty bound to assess correct income of assessee as held by the Hon'ble Apex Court in the case of Mahalaxmi Sugar Mills, 160 ITR 920(SC).

2.6. On the facts and in the circumstances of the case and in law, the Id. CIT(A) has erred in not appreciating that in all the assessments framed u/s 153A, authorization u/s 132 was issued and incriminating material was found during the course of search in the premises controlled by the searched group which directly belong to the concerned assessee.

3. On the facts and in the circumstances of the case and in law, the Id. CIT(A) has misinterpreted and extrapolated the judgment of Hon'ble Delhi High Court in the case of CIT Vs. Kabul Chawla, 380 ITR 573 (Del) as this judgment lays the principle that an assessment has to be made under this section only on the basis of seized material and the assessment cannot be arbitrary. This decision also nowhere states that addition u/s 153A can only be made if incriminating material is found during search from the premises of the ***concerned*** *assessee.*

3.1. On the facts and circumstances of the case and in law, the Ld.CIT(A) has erred in not appreciating the decisions of Hon'ble Delhi High court in the case of CIT Vs Anil Kumar Bhatia [211 Taxman 453, 352 ITR {493}] & Kerala High Court in the case of E.N. Gopakumar vs. Commissioner of Income-tax (Central) [2016] 75 Taxmann.com 215 (ker.)

wherein Courts held that assessments in a search case can be concluded against interest of assessee including making additions even without any incriminating material being available against assessee in search under section 1 32.

4. On the facts and circumstances of the case and in law, whether by the order of the Ld.CIT{A), it has erred in its interpretation of Section 153A by holding that separate assessments have to be framed u/s 153A as well as 153C for the same assessee for the same assessment year who has been searched u/s 132, depending upon the number of premises where incriminating materials were found belonging to the assessee from various premises controlled by the "assessee group"? Thus, as held by the Ld.CIT(A), the question is "is it permissible to have parallel assessment proceedings u/s 153A as well as 153C to be carried out in each case for each assessment year, resulting into. 'n' number of assessment orders, for each assessee for each year which is totallyto the provision of the Act that there willbe one asessment order for each year in case of an assessee subjected to search u/s 132".

*5. On the facts and circumstances of the case and in law, whether the Ld.CIT(A) has erred while quashing the order u/s 153A stating that no incriminating material has been found from the searched premises of the **concerned**assessee, without appreciating the fact that incriminating materials were found and seized from various other premises managed and controlled by the assessee and are duly covered u/s 132 of the I.T. Act, 1961?*

6. On the facts and circumstances of the case and in law, the Id. CIT(A) erred in deleting the additions made by the AO in respect of the share application money including share premium, cash credits (loans) u/s.68, disallowance of the expenditure being commission paid on the share application money and unsecured loans u/s.69C of IT Act on legal grounds.

7. On the facts and circumstances of the case and in law, the Ld. CIT{A) has in deleting the addition of Rs.10,42,49,000/- made u/s 68 on account of unexplained credits in the form of Share Application Money, on legal grounds, without going into the merits of the issue.

*8. On the facts and circumstances of the case and in law, the Ld. CIT(A) has **in** deleting the addition of Rs.20,84,980/- made u/s 69C on account of unaccounted expenses on accommodation entry of Share Application Money, on legal grounds, without going into the merits of the issue.*

9. On the facts and circumstances of the case and in law, the Ld. CIT(A) has erred in deleting the addition of Rs.10,01,98,618/- made u/s 68 on account of unexplained credits in the form of unsecured loans on legal grounds, without going into the merits of the issue.

10. On the facts and circumstances of the case and in law, the Ld. CIT{A) has erred in deleting the addition of Rs.20,03,972/- made u/s 69C on account of unaccounted expenses on accommodation entry of unsecured loans on legal grounds, without going into the merits of the issue.

11. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) ought to have upheld the order of the A.O.

12. It is, therefore, prayed that the order of the Ld. CIT(A) be set aside and that of the A.O. be restored to the above extent.

3. The effective issue raised by the Revenue is that the ld. CIT-A erred in deleting the addition made by the AO for Rs. 20,44,47,618 under section 68 of the Act and corresponding expenses under section 69C of the Act for Rs. 40,88,952.00 only.

4. The facts in brief are that the assessee is a private company and claimed to be engaged in the business of Investment and Trading in Shares & Securities. There was a search and seizure action under section 132 of the Act dated 04-12-2014 carried out at the premises of "Barter/ Accommodation Entry Provider Group" and the assessee being part of the group was also subject to such search proceedings. As a result of search, proceeding under section 153A of the Act was initiated vide notice dated 22-07-2015 and in response to which the assessee declared income at Rs. NIL in the return filed under section 153A of the Act.

5. The AO during the assessment proceedings under section 153A of the Act found that the assessee has received accommodation entry in the form of share capital along with premium and unsecured loan from the entities controlled and managed by the entry provider namely Shri Shrish Chandrakant Shah, Shri Parveen Kumar Jain and Shri Partik R Shah. In addition to the above, the assessee also received share capital, premiums and unsecured loan from other parties too. The AO in holding so referred the documents found and statement recorded during the independent search carried at the premises of above mentioned 3 parties. The AO also noticed that the documents found from the premises of above mentioned parties co-relate with the documents found during the search at the assessee group i.e. from the premises of Shri Asit Vohra marked as annexure A/5, A/6 and A/7 and from the office of Shri Anil Hiralal Shah situated at B-406, Wall Street-II Ellisbridge, Ahmedabad marked as page 247 of Annexure A-1 of the seized documents. Accordingly, the AO treated the credit of Share Capital along with premium and unsecured loan received during the year under consideration for Rs. 10,42,49,000/- and Rs. 10,01,98,618/- respectively as unexplained cash credit under section 68 of the Act and added to the total income of the assessee.

The AO also worked out expenses incurred for taking such accommodation entries of shares capital and loan @ 2% i.e. Rs. 20,84,980/- and Rs. 20,03,972/- and added to the total income of the assessee under section 69C of the Act.

6. The aggrieved assessee preferred an appeal before the learned CIT(A).

6.1 The assessee before the learned CIT(A) submitted that no material of incriminating nature was found from its premises. There were only two premises being A-301, Wall Street II, Ellisbridge and 24, Jogeshwari Park against which panchanama was drawn in its name but no document of incriminating nature was found from the said premises neither the reference was made by the AO of such premises while making addition to the total income. Therefore, no addition can be made in the proceedings under section 153A of the Act in the absence of incriminating documents found from its premises. The materials referred and relied by the AO for making addition were found from the premises of third parties being Shri Shrish Chandrakant Shah, Shri Parveen Kumar Jain and Shri Partik R Shah. The AO also referred the materials found from the premises of Shri Ashit Vohra marked as annexure A/5, A/6 and A/7 and from the office of Anil Hiralal Shah situated at B-406, Wall Street-II Ellisbridge, Ahmedabad marked as page 247 of annexure A-1 but in panchnamaneither the name of the assessee was there norany document containing its name was found. Accordingly, the assessee contended that the material found from the premises of third parties cannot be referred for making addition in the proceedings under section 153A without invoking and complying with the provision of section 153C of the Act. The assessee in support of its contention relied on various judicial pronouncements which are incorporated in the order of learned CIT(A).

7. The learned CIT(A) after considering the facts in totality accepted the contention of the assessee that no addition can be made in absence of incriminating material found from the premises of the assessee. Likewise, no material found during the search at the premises of the third party can be

utilizedwithout complying the provisions of section 153C of Act. The relevant observation of the learned CIT(A) reads as under:

> *11.2 In the appellant's case, there is three fold violation of law viz: one is violation of provisions of section 153C, second making addition inspite of lack of material seized in the course of search at the place of appellant and the last being used of material seized from third party which is not permissible in the assessment proceedings u/s.153A of IT Act.*
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> *11.3 The facts relevant to violation of provisions of section 153C of the Act are as under:*
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> *In the Assessment Order the AO has discussed about Annexure A-1 page no. 247 seized from the premises B-406, Wall Street-II, Ellisbridge, Ahmedabad. The panchnama of B-406, Wall Street-II, Ellisbridge, Ahmedabad does not include the name of the appellant company. The page No. 247 seized from the premises B-406, Wall Street-II, Ellisbridge, Ahmedabad nowhere the name of the appellant company is found noted and hence using such loose papers seized from the premises of third party to frame an assessment in the case of the appellant is unjustified and bad in law.*
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> *11.4 In the Assessment order the AO has discussed in Para 9.3 about the evidences of accommodation entries received during the period 01.01.2012 to 14 in the form of unaccounted cash book seized as per Annexure A/5, A/6 and A/4 from the premises of Shri Ashit Vora. The material on which the AO has relied upon has been seized from the premises of Shri Ashit Vora from B-5 Vasupujya Society, Paldi, Ahmedabad wherein also in the panchnama nowhere the name of the appellant company has been found mentioned. Further, the loose pages seized from the premises are related to the F.Y. 2011-12 to F.Y. 2014-15 i.e. A.Y. 2012-13 to A.Y. 2015-16 and also are not related to the appellant company. Hence, making addition relying upon the material or information gathered during the search and survey carried out on third persons cannot be used for the purpose of section 153A. In case, he decided to use the material seized from third parties in the assessments of the assessee, the only course open to him is invoking provisions of section 153C of the Act which was not done by the AO. Thus the appellant has contended that the addition made for A.Y. 2009-10 to A.Y. 2015-16 is baseless as no incriminating material/ no material has been found and seized from the place of appellant company.*
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> *11.5 The appellant has submitted that there were two panchnamas wherein the name of the appellant company (i.e. Real Marketing Pvt. Ltd.)has been mentioned which are*
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> *1) Panchnama drawn at the premises of A-301 Wall Street II, Nr. Gujarat College, Ellisbridge, Ahmedabad and*
>
> *2) Panchnama drawn at 24, Jogeshwari Park Society, B/h. Priya Cinema, Krishnanagar, Ahmedabad.*
>
> *On verification of the material seized and found from the premises of the appellant company at the above places it can be seen that the said material/records were not incriminating in nature. Also the AO in the assessment order has nowhere mentioned about the use of seized material found from the appellant's premises for making the additions which clearly shows that there is no incriminating material found during the course of search at the places of appellant. Hence, it is clear that if no incriminating material was found during search at the places of appellant, no addition could be made on basis of material collected from third parties after the search and hence the addition made by the AO in the case of the appellant is required to be deleted in toto as per the appellant. Appellant's case is squarely covered by decision of Honourable Gujarat High*

Court in the case of Pr. CIT v Saumya Construction (P.) Ltd. [2017] 81 taxmann.com 292 (Gujarat) / 387 ITR 529 (Gujarat)

11.6 The facts relevant to violation of provisions of section 153C of the Act are as under:

- An alleged material used in appellant's assessment order (Para No.9) was seized from the premises of Shri Shrish Chandrakanth Shah , Shri Praveen Kumar Jain and Shri Ashit Vora, third parties, in course of an independent search carried out at their places.

- Even though AO of the appellant liberally used the material seized in the cases/places of third parties i.e 'searched persons', he passed the order u/s 153A of the Act by making the addition based upon the material seized at the place of third parties.

- Even though AO of the 'third parties' i.e' searched persons' was lawfully bound to record his individual satisfaction in respect of the incriminating material found at the places of searched persons but no such satisfaction was recorded by him.

- No notice u/s 153C of the Act was issued to the appellant.

- AO of the appellant made huge addition in the assessment of the appellant on the basis of material seized from 'third parties' i.e' searched person'.

- The AO of the 'searched person' and the AO of the appellant did not follow any of the mandatory requirements prescribed in law and judicial pronouncements in a catena of reported decisions rendered by higher judiciary.

- AO of the appellant usurped and executed all the powers conferred u/s 153C of the Act in total violation of law without even issuing notice u/s.153C to the appellant.

11.7 Section 153C(1) of the Act, as it stood on the date of search i.e 04.12.2014, reads as under:

"Assessment of income of any other person.

{1} Notwithstanding anything contained in section 139, section 147, section 148, n 149 section 151 and section 153,where the Assessing Officer is satisfied that, any money, bullion, jewellery or other valuable article or thing or books of account or documents seized or requisitioned belongs or belongtoa person other than the person referred to in section 153A, then, the books of account or documents or assets, seized or requisitioned shall be handed over to the Assessing Officer having jurisdiction over such other personandthat Assessing Officer shall proceed against each such other person and issue such other person notice and assess or reassess income of such other person in accordance with the provisions of section 153A".

Section 153C of the Act comes into operation when undisclosed assets, incriminating books and documents belonging to any person other than the searched person (other person) were seized in course of searches at the place of searched person. The section mandates fulfillment of the following pre-conditions before proceeding to use the seized assets, books and documents (Seized material) in the case of any other person:

‣ There has to be a search u/s 132 of the Act and incriminating material belonging to any 'other person' should have been seized.

‣ The AO of the 'searched person' is bound to arrive at his satisfaction that the seized material belongs to any other person.

‣ The AO of the 'searched person' shall handover the seized material to the AO having jurisdiction over the 'other person'.

‣ After receiving the seized material, AO of the 'other person' shall proceed against the 'other person' and issue notice under section 153C of the Act to assess or reassess his income.

11.8 Here it is mentioned that section 153C of the Act comes into operation when undisclosed assets, incriminating books and documents belonging to any person other than the searched person (other person) were seized in course of searches. The section mandates fulfillment of the following pre-conditions before proceeding to use the seized assets, books and documents (seized material) in the case of any other person:

There has to be a search u/s 132 of the Act and incriminating material belonging to any 'other person' should have been seized.

The AO of the 'searched person' is bound to arrive at his satisfaction that the seized material belongs to any other person.

The AO of the 'searched person' shall handover the seized material to the AO having jurisdiction over the 'other person'.

After receiving the seized material, AO of the 'other person' shall proceed against the 'other person' and issue notice under section 153C of the Act to assess or reassess his income.

11.9 It is worth to mention that the provisions of section 158BD are perimetria to the provisions of section 153C of IT Act. In this regard the first authority on the issue is the decision of the Hon'ble Supreme Court in the case of Manish Maheswari vs. ACIT (2007) 289 ITR 341 (SC) albeit u/s 158BO of the Act.

The decision of Hon'ble Gujarat High Court in the case of CIT vs. Lalit Kumar Patel [2013] 36 taxmann.com 554 (Gujarat)

The decision of Hon'ble Gujarat High Court in the case of CIT v.ChampakbhaiMohanbhai Patel [2015] 60 taxmann.com 128 (Gujarat)/370 ITR700 (Gujarat)

In the above decisions of the Hon'ble Courts have held that if the Assessing Officer has not recorded its satisfaction, which is mandatory; no addition could be made under the said provisions.

11.1 O There were a number of cases in which higher judicial authorities has been annulling orders of the AOs for not following the mandatory conditions of sections 158B0 and 153C of the Act by the AOs. In order to guide the AOs and to reduce litigation in this regard CBDT issued Circular No. 24/2015 dated 31.12.2015 further emphasising, mandating recording of satisfaction of the AO before proceeding to use the material seized in the case of a searched person and issuing notice u/s 153C of the Act, in the case of 'other person'. The same is reproduced below:

"CIRCULAR No.24/2015[F.No.279/MISC./140/2015/ITJ], DATED 31-12-2015"

The issue of recording of satisfaction for the purposes of section 158BD/153C has been subject matter of litigation.

2. The Hon'ble Supreme Court in the case of M/s Calcutta Knitwears in its detailed judgment in Civil Appeal No. 3958 of 2014 dated 12-3-2014 [2014} 43 taxmann.com 446

{SC) (available in NJRS at 2014-LL-0312-51} has laid down that for the purpose of section 15880 of the Act, recording of a satisfaction note is a prerequisite and the satisfaction note must be prepared by the AO before he transmits the record to the other AO who has jurisdiction over such other person u/s 1588D. The Hon'ble Court held that "the satisfaction note could be prepared at any of the following stages:

(a) at the time of or along with the initiation of proceedings against the searched person under section 158BC of the Act; or

(d) in the course of the assessment proceedings under section 158BC of the Act; or

(e) immediately after the assessment proceedings are completed under section 158BC of the Act of the searched person.

3. Several High Courts have held that the provisions of section 153C of the Act are substantially similar/pari-materia to the provisions of section 1588D of the Act and therefore, the above guidelines of the Hon'ble SC, apply to proceedings u/s 153C of the IT Act, for the purposes of assessment of income of other than the searched person. This view has been accepted by CBDT.

4. The guidelines of the Hon'ble Supreme Court as referred to in para 2 above, with regard to recording of satisfaction note, may be brought to the notice of all for strict compliance. It is further clarified that even if the AO of the searched person and the "other person" is one and the same, then also he is required to record his satisfaction as has been held by the Courts.

5. In view of the above, filing of appeals on the issue of recording of satisfaction note should also be decided in the light of the above judgment. Accordingly, the Board hereby directs that pending litigation with regard to recording of satisfaction note under section 1588D/153C should be withdrawn/not pressed if it does not meet the guidelines laid down by the Apex Court".

11.11 A combined reading of section 153C of the Act, CBDT circular and the decision of the Hon'ble Supreme Court clearly bring out the mandatory requirements to be fulfilled by both the AOs i.e the one having jurisdiction over the 'searched person' and the other having jurisdiction over the 'other person' as under:

The AO having jurisdiction over the 'searched person' has to record his satisfaction in writing that the seized assets belong to the 'other person'.

The AO of the 'searched person' shall hand over the seized books & documents and assets to the AO having jurisdiction over the 'other person'.

The AO having jurisdiction over the 'other person' shall proceed against the person' by issuing notice u/s 153C of the Act.

The AO of the 'other person' shall assess or reassess his total income in nee with the provisions of section 153A of the Act.

11.12 While holding that recording of proper satisfaction, giving a finding that the seized material belonged to the 'other person' was mandatory to assume jurisdiction by the AO of the 'other person', the higher judiciary prescribed strict standards and basic parameters to be followed while recording the satisfaction by the AO of the 'searched person' to enable him to justify his action and to confer jurisdiction on the AO of 'other person'. The important parameters to be followed and the case law on the respective issues are listed below:

a) Even acceptanceof transactions found in the material seized from 'searched person'by 'other person' in course of statement recorded from him u/s 132(4) of the Act would not help in confirming the assessments if satisfaction was not recorded by the AO of the 'searched person'. It was held that during the course of assessment under Section 153A, the incriminating material, if any, found during the course of search of the assessee only can be utilized and not the material found in the search of any other person.

Lalit Mahajan vs. DCIT (19.3.2019) ITA No. 5585/Delhi/2015(ITAT, Delhi)

b. The requirement of recording of satisfaction cannot be substituted by furnishing an appraisal note which is prepared by search party after completion of search.

ACIT v. Amit Pande [2011] 14 taxmann.com 93/48 SOT 4 (URO){Indore)

c. Recording of satisfaction by the AO of the 'searched person' is a mandatory requirement for invoking section 153C of the Act. It is an essential and prerequisite condition for bestowing jurisdiction to AO of 'other person' under section 153C.

CIT v. Shettys Pharmaceuticals & Biologicals Ltd. [20151 57 taxmann.com 282/232 Taxman 268 (AP.);

CIT (Central) v. Gopi Apartment [20141 46 taxmann.com 280 (Allahabad)

Dy. CIT v. SatkarRoadlines (P.) Ltd. [20151 62 taxmann.com 327/155 ITD 501 (Delhi - Trib.);

DIT v. Ingram Micro (India} Exports (P.} Ltd. [2015] 60 taxmann.com 57/234 Taxman 464 (Bom.);

Pr. CIT v.Nikki Drugs & Chemicals (P.) Ltd. [2015] 64 taxmann.com 309/[2016] 236 Taxman 305 (Delhi);

CIT v. Mechmen 11-C [2015] 60 taxmann.com 484/233 Taxman 540 (MP.)

d. A.O. of the searched person must first arrive at a clear satisfaction that particular documents seized did not belong to the person from whom it has been seized. Thereafter, he should form a satisfaction that the seized document belongs to such and such other person.

11.13 It is also submitted that U/s 132(4A)(i), there is a presumption that the documents seized from a person belonged to such person. There is also presumption u/s 292C(l)(i) that a document which is found from a person who was searched, would be belonging to that person. The Hon'ble High Court has held that the A.O. must at the first instance rebut such a presumption provided in the Act itself and only thereafter he should come to the conclusion or satisfaction that the seized document belonged to someone else. There must be some cogent material available with the A.O. before he arrives at a satisfaction that the seized document did not belong to the searched person but to somebody else and that surmises and conjectures can not take the place of satisfaction.

Pepsico India Holding (P.) Ltd. v. ACIT [2014] 50 taxmann.com 299/(2015] 228 Taxman 116 (Mag.) (Delhi)

11.14 The facts of the case mentioned as above, clearly show that the AO of three parties mentioned above did not record any satisfaction whatsoever regarding the material seized in his case. In such a case, the question that the material was incriminating and it belonged to the appellant did not arise. In the absence of such satisfaction, AO of the appellant could not have issued any notice u/s 153C of the Act. In fact, AO did not issue any notice u/s 153C of the Act to the appellant. In the absence of satisfaction of the AO of the three parties mentioned above, i.e. the searched persons and notice u/s 153C, AO of the appellant was precluded by law from taking cognizance of the material, howsoever incriminating it was and using it in the assessment of the appellant. The action of the AO in using the material is in total violation of provisions of section 153C of the Act, cases decided by the Hon'ble Supreme Court & various High Courts and directions given by CBDT.

11.15 This view has been subscribed and followed from the Recent decision of Hon'ble ITAT, Ahmadabad Bench in the case of Dilipkumar Lalwani in IT (55) A No.75 to 80/Ahd/2019 and Others in a bunch of 107 appeals rendered on 12/11/2020.

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11.20 It is submitted that no material relevant to the addition made by the AO was found or seized in the course of searches carried out at appellant's premises . The AO used the material allegedly seized at the premises of Shri Asit Vora in course of searches conducted in his case independently. As elaborately submitted in the preceding paragraphs, use of material seized in other cases without following the procedure prescribed under the provisions of section 153C and issuing notice under the said section is in violation of law and such addition cannot be sustained and has to be deleted.

11.21 Now, the only issue that remains to be considered is whether law permits the AO to make addition without any evidences seized during searches in the case of the assessee concerned. On this issue, all the Hon'ble High Courts are unanimous on the point that assessment under section 153A is to be framed on the basis of material found during the course of search or requisitioned under section 132A of the Act. Any other material or information gathered during the search and survey carried out on third persons, cannot be used for the purpose of section 153A. In case, he decided to use the material seized from third parties in the assessments of the assessee, the only course open to him is invoking provisions of section 153C of the Act which was not done by the AO in the case of appellant. Thus there is non compliance of provisions of section 153C of IT Act and the additions have been made u/s.153A of IT Act which is not in accordance with the judicial pronouncements made by the Hon'ble Courts as discussed in the preceding paras of this order.

11.22 The issue related to addition u/s 153A in the cases in which the proceedings are not abated has been decided in favour of the assessee by the Jurisdictional High Court and Jurisdictional Tribunal as relied upon by the ant. Legal position on the issue has been discussed comprehensively in the case CIT vs. Kabul Chawla (2016) 380 ITR 573 (Del-HC) dated 28/08/2015.

11.23 It is a settled position of law at present that the completed assessments can be interfered with by the Assessing Officer while making assessment under section 153A only on the basis of some incriminating material unearthed during the course of search at the place of assessee, which was not produced or not already disclosed or made known in the course of the original assessment proceedings.

11.24 Further, the appellant had filed the original return on 30.09.2009 and the regular assessment u/s.143(1) of the Act got concluded and no notice u/s. 143(2) was issued before 30.09.2010 and the assessment proceedings of the A.Y. 2009-

10 were not pending on the date of search i.e. 04.12.2014 and hence the year under consideration was unabated assessment year in which no addition can be made in the absence of incriminating material found during the course of search. Unabated assessment can be disturbed only to the extent of incriminating material found during search at the place of the appellant. The appellant in support of the contention has relied upon the decision of Honourable Gujarat High Court in the case of Pr. CIT - 4 vs. Saumya Construction (P.) Ltd. [2017] 81 taxmann.com 292 (Gujarat) / 387 ITR 529 (Gujarat) and other High Court and Hon"ble Ahmedabad Tribunal as well as other Tribunal decisions in its submission filed during the course of appellate proceedings.

From perusal of the assessment order, it reveals that the AO has not identified any of the seized material and/or incriminating material found and seized during the course of search proceedings from the premises of the appellant in respect of the share capital/ share premium received during the year under consideration and also the other additions made in the assessment order. On going through the case laws relied upon by the appellant, it is found that the appellant's case is clearly covered by the above mentioned judgments. As the assessment for A.Y. 2009-10 before the date of search in the case of the appellant on 04.12.2014 had concluded and therefore, in absence of any incriminating material and/or seized material found during the course of search proceedings in respect of the same share capital/share premium received during the year under consideration, and the other additions made by the AO are not justified.

11.25 It is therefore submitted that the Assessing Officer has simply gone beyond the scope of the provisions of section 153A of the Act which comes into operation only after a search has been carried out u/s 132 of the Act and to assign power to the Income-tax authorities for a specific purpose only i.e. for unearthing concealed income.

11.26 The fact which may require appreciation at this stage is that even in the assessment order framed u/s.153A, wherein addition made, there is no reference of any incriminating material. It is therefore submitted that on account of this special and very important factual matrix of this case, the provisions of section 153A are not applicable. To strengthen the aforesaid contention, it is submitted that it is very settled position of law as evident from various decisions of Tribunal as well as High court that Assessing Officer has no jurisdiction to make additions in the order passed u/s 153A of the Act which are not pertaining to any undisclosed income or seized material when proceedings are closed and attained finality. In support of its contention the appellant strongly relies on the decision of

Hon'ble Gujarat High Court in case of CIT Vs. Saumya Construction Pvt Ltd (Tax appeal No. 24 of 2016) dated 14th March 2016.

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11.27 It is an undisputed fact that on the date of initiation of the search no assessment proceedings were pending in this assessment year. Therefore, the proceedings were not abated in the case as mentioned in the second proviso to section 153A (1) of the Act. It seems that the AO lost sight of the fact that he was not making an assessment under section 153A (1) of the Act read with its second proviso. As discussed hereinabove, there is no indication in the contents of the assessment order that the addition was made on the basis of any incriminating material found and seized in search at the place of appellant.

11.28 In view of the aforesaid findings and respectfully following the judgments/decisions of Jurisdictional High Court, Jurisdictional Tribunal and other Courts, wherein it has been held that in absence of incriminating material / evidences found at the place of appellant, addition / disallowance cannot be sustained within the pale of section 153A of the Act. In my considered opinion, the action of the AO for making addition not justified.

11.29 During the course of assessment proceedings the appellant has sought cross examination of Shri Shirish C. Shah, Shri Pravinkumar Jain & others vide submission dated 26.12.2016 and also during the course of remand proceedings. However, the AO has not granted the opportunity of cross examination. Hence relying upon the decision of Andaman Timber Industries vs. Commissioner of Central Excise, Kolkatta-ll (2015) 62 Taxmann.com 3 (SC) and other decisions of Jurisdictional Gujarat High Court the impugned order has a serious flaw which makes the order against the principle of natural justice and equity.
11.30 in view of the above discussion, it has been noticed that the additions made by the AO in respect of the share application money including share premium, cash credits (loans) u/s.68, disallowance of the expenditure being commission paid on the share application money and unsecured loans u/s.69C of IT Act are found legally not sustainable and hence the same are deleted on this legal ground.

8. Being aggrieved by the order of the learned CIT(A), the Revenue is in appeal before us.

9. The learned DR before us submitted that once a search has been conducted under section 132 of the Act, it is mandatory for the AO to frame the assessment under section 153A of the Act for the six years preceding the year of search and the year of search. There is no mentioned under the provisions of the Act to restrict the addition based on the incriminating documents found on the premises of the search person. Likewise, as per the ld. DR, there is no prohibition from using the documents found on the premises of the third parties while framing the assessment under section 153A read with section 143(3) of the Act.

10. On the contrary, the learned AR before us submitted that the year being unabated assessment year, the same cannot be disturbed in the search proceedings under section 153A of the Act in the absence of incriminating material. As per the ld. AR, the assessment under search proceedings is limited to the extent of the incriminating documents found on the premises of the search person. As such, there was no document found from the premises of the search person, therefore, no addition can be made. Likewise, as per the ld. AR, the documents found on the premises of the third parties cannot be used while framing the assessment under section 153A read with section 143(3) of the Act without complying the provisions of section 153C of the Act.

10.1 Both the ld. DR and the AR before us vehemently supported the order of the authorities below as favourable to them.

11. We have heard the rival contentions of both the parties and perused the materials available on record. Admittedly, there was search proceeding under section 132 of the Act dated 4th December 2014 (i.e. during the financial year 2014-15 corresponding to A.Y. 2015-16) carried out in the case of "Barter/Accommodation Entry Provider Group" including the assessee and in consequence to the same, the proceedings under section 153A of the Act were initiated in case of respondent assessee for the A.Y. 2009-10 to 2014-15. The assessment under section 153A r.w.s section 143(3) of the Act for the year under consideration i.e. A.Y. 2009-10 was framed after making addition of Rs. 20,85,36,570/- being bogus accommodation entry in form of share capital, premium, unsecured land and unexplained expenses incurred for taking such accommodation entry. On appeal by the assessee, the learned CIT (A) deleted the addition made by the AO by observing that there was no material of incriminating nature found during the search at the premises of the assessee, therefore the year under consideration being unabated/completed assessment years, no addition should be made in the absence of any incriminating material. The learned CIT(A) also observed that the materials referred by the AO for making the addition in the

hands of the assessee was found in the search proceedings at third parties, therefore the same cannot be utilized against the assessee without complying and invoking the provisions of section 153C of the Act. The learned DR before us vehemently argued that there is no provision under section 153A/153C which restrict the assessment or reassessment in case of search to the extent of incriminating materials only.

11.1 With regard to fact that no addition can be made in absence of incriminating material we find that it has been settled by various Hon'ble Court including Hon'ble Jurisdictional High Court that the completed/ unabated assessments cannot be disturbed in the absence of any incriminating materials/ documents whereas the assessment/ reassessment can be made with respect to abated assessment years. The word 'assess' in Section 153A/153C of the Act is relatable to abated proceedings (*i.e.* those pending on the date of search) and the word 'reassess' to the completed assessment proceedings. The Hon'ble Gujarat High Court in the case of Saumya Construction reported in 81 taxmann.com 292 has held that there cannot be any addition of regular items shown in the books of accounts until and unless there were certain materials of incriminating nature found during the search. The word incriminating has not been defined under the Act but it refers to those materials/ documents/ information which were collected during the search proceedings and not produced in the original assessment proceeding. Simultaneously, these documents had bearing on the total income of the assessee. Now coming to the case on hand, we note that there was no incriminating document of whatsoever found from the premises A-301, Wall Street II, Ellisbridge and 24, Jogeshwari Park against which panchanama was drawn in the name of respondent assessee. The AO in the assessment order while making the addition in the hands of assessee nowhere referred any material of incriminating nature found from the above 2 premises of assessee regarding credit of share capital along with premium and unsecured loan with reference to the year under consideration which would have made basis for the addition in the assessment. TheAO for making the addition referred the material found from the

premises of the third parties Shri Shrish Chandrakant Shah, Shri Parveen Kumar Jain and Shri Partik R Shah. We find that these parties are unconnected to the assessee and search carried on their premises were an independent search. Likewise, the AO also referred the materials found from the premises of Shri Ashit Vohra marked as annexure A/5, A/6 and A/7 and from the office of Anil Hiralal Shah situated at B-406, Wall Street-II Ellisbridge, Ahmedabad marked as page 247 of annexure A-1. In this regard, we note that though the search was carried on same date on the premises of Shri Ashit Vohra and A/7 and the office of Shri Anil Hiralal Shah and it was alleged to be part of the group to which respondent assessee belongs. However, the search Panchama drawn on above premises of Shri Ashit Vohra and the office of Anil Hiralal Shah does not include the name of the respondent assessee which establishes search at those premises are independent from the search carried on the premises of the assessee.

11.2 At the time of hearing, the learned DR has not brought anything on record contrary to the finding of the learned CIT (A) suggesting that additions were made based on incriminating materials found from the premises of the assessee. Accordingly, we hold that there cannot be any addition of the regular items which were disclosed by the assessee in the regular books of accounts in the absence of material/information of incriminating nature found from the premises of the assessee. In holding so, we draw support and guidance from the judgment of Hon'ble Gujarat High Court in case of Saumya Construction (P.) Ltd (supra) wherein it was held as under:

> *Thus, while in view of the mandate of sub-section (1) of section 153A in every case where there is a search or requisition, the Assessing Officer is obliged to issue notice to such person to furnish returns of income for the six years preceding the assessment year relevant to the previous year in which the search is conducted or requisition is made, any addition or disallowance can be made only on the basis of material collected during the search or requisition. In case no incriminating material is found, the earlier assessment would have to be reiterated.*

11.3 In view of the above, we hold that there cannot be any addition to the total income of the assessee of the regular items as made by the AO in the present

case. Accordingly, we do not find any infirmity in the finding of the learned CIT (A) to this extent.

11.4 Coming to the utilization of materials found during the search proceeding from the premises of the third parties.In the case on hand, the materials found from unconnected search at the premises of Shri Shrish Chandrakant Shah, Shri Parveen Kumar Jain and Shri Partik R Shah or the material found from the premises of Shri Asit Vohra and from the office of Shri Anil Hiralal Shah situated at B-406, Wall Street-II Ellisbridge which do not belong to the assessee as the name of assessee was not found in the panchanama drawn on theses premises. The law is fairly settled that the proceedings under section 153C of the Act can be initiated in a situation where the documents/materials belonging/pertaining to the assessee were recovered from the premises of the 3rd party during search proceedings under section 132 of the Act. Then, the AO of the search party has to record the satisfaction by observing that the documents found in the course of search from the premises of the 3rd party belongs/ pertains to the person other than the searched person and he will hand over such satisfaction along with the necessary documents to the AO of such other person who was not subject to search. The AO of the other person has again will record his satisfaction that the documents found from the premises of the 3rd party during search has bearing on the income of the assessee. The question arises what the fate of the case would be where there was search in the case of the assessee as well as in the case of the other party under the provisions of section 132 of the Act and the document was found from the premises of the 3rd party. This issue has been answered by the order of this Tribunal in the case of Shri Rajesh Sundardas Vaswani & others in IT(SS)A No. 95/Ahd/2019 & others where the coordinate bench vide order dated 12-11-2020 quashed the assessment order passed under section 143(3) r.w.s. 153A of the Act. The relevant finding of the ITAT is extracted from paras 29 to 38, pages 32 to 48 of the relevant order.

11.5 Likewise, the coordinate of bench of Kolkata ITAT in case of Krishna Kumar Singhania reported in 88 taxmann.com 259 where search under section carried on Cygnus Group of Cases comprising of various companies and individuals on 23-12-2014 at various residential premises / offices. The assessee Shri Krishna Kumar Singhania was one of the key persons of the group and his personal premises was also subject to the search as on 23-12-2014 but no incriminating material was found from his premises. However, the AO made the addition of bogus long term capital gain based on material found from the office premises of the group companies but panchanama drawn on such office premises does not include the name of the assessee i.e. Shri Krishna Kumar Singhania. In such facts and circumstances the coordinate bench held that the seized documents from the office premises of group of companies in which assessee was a director, said material could not be used under section 153A of the Act against assessee. The relevant finding of the bench reads as under:

> ***10.*** *We have heard the rival submissions. We find that it is not in dispute that there were no documents that were seized from the premises of the assessee except loose sheets vide seized document reference KKS /1 comprising of 8 pages , for which satisfactory explanation has been given by the assessee and no addition was made by the ld AO on this seized document. The seized document used by the ld AO for making the addition in section 153A assessment is CG/1 to 11 and CG/HD/1 which were seized only from the office premises of Cygnus group of companies in which assessee is a director. In this regard, it would be pertinent to note that as per section 292C of the Act, there is a presumption that the documents , assets, books of accounts etc found at the time of search in the premises of a person is always presumed to be belonging to him / them unless proved otherwise. This goes to prove that the presumption derived is a rebuttable presumption. Then in such a scenario, the person on whom presumption is drawn , has got every right to state that the said documents does not belong to him / them . The ld AO if he is satisfied with such explanation , has got recourse to proceed on such other person (i.e the person to whom the said documents actually belong to) in terms of section 153C of the Act by recording satisfaction to that effect by way of transfer of those materials to the AO assessing the such other person. This is the mandate provided in section 153C of the Act. In the instant case, if at all, the seized documents referred to in CG/1 to 11 and CG/HD/1 is stated to be belonging to assessee herein, then the only legal recourse available to the department is to proceed on the assessee herein in terms of section 153C of the Act. In this regard, we would like to place reliance on the recent decision of the Hon'ble Delhi High Court in the case of CIT v. Pinaki Misra & Sangeeta Misra [2017] 392 ITR 347 dated 3.3.2017, wherein it was held that, no addition could be made on the basis of evidence gathered from extraneous source and on the basis of statement or document received subsequent to search. Hence we hold that the said materials cannot be used in section 153A of the Act against the assessee. This opinion is given without going into the merits and veracity of the said seized documents implicating the assessee herein.*
>
> ***10.1*** *Hence now the only issue which is left to be addressed is the preliminary issue of whether the addition could be framed u/s 153A of the Act in respect of a concluded*

proceeding without the existence of any incriminating materials found in the course of search. The scheme of the act provides for abatement of pending proceedings as on the date of search. It is not in dispute that the assessment for the Asst Year 2009-10 was not selected for scrutiny and the time limit for issuance of notice u/s 143(2) of the Act had expired and hence it falls under concluded proceeding , as on the date of search. We hold that the legislature does not differentiate whether the assessments originally were framed u/s 143(1) or 143(3) or 147 of the Act. Hence unless there is any incriminating material found during the course of search relatable to such concluded year, the statute does not confer any power on the ld AO to disturb the findings given thereon and income determined thereon, as finality had already been reached thereon, and such proceeding was not pending on the date of search to get itself abated. The provisions of section 153A of the Act are reproduced hereunder for the sake of convenience :—

"[Assessment in case of search or requisition

153A. [(1)] Notwithstanding anything contained in section 139, section 147, section 148, section 149, section 151 and section 153, in the case of a person where a search is initiated under section 132 or books of account, other documents or any assets are requisitioned under section 132A after the 31st day of May, 2003, the Assessing Officer shall—

(a) issue notice to such person requiring him to furnish within such period, as may be specified in the notice, the return of income in respect of each assessment year falling within six assessment years referred to in clause (b), in the prescribed form and verified in the prescribed manner and setting forth such other particulars as may be prescribed and the provisions of this Act shall, so far as may be, apply accordingly as if such return were a return required to be furnished under section 139;

(b) assess or reassess the total income of six assessment years immediately preceding the assessment year relevant to the previous year in which such search is conducted or requisition is made :

Provided that the Assessing Officer shall assess or reassess the total income in respect of each assessment year falling within such six assessment years:"

10.2 *We find that the Co-ordinate Bench of this tribunal in the case of ACIT v. Kanchan Oil Industries Ltd in ITA No. 725/Kol/2011 dated 9.12.2015 reported in 2016- TIOL-167-ITAT-KOL had explained the aforesaid provisions as below:—*

"6.4 In our opinion, the scheme of assessment proceedings should be understood in the following manner pursuant to the search conducted u/s. 132 of the Act :—

(a) Notice u/s. 153A of the Act would be issued on the person on whom the warrant of authorization u/s. 132 of the Act was issued for the six assessment years preceding the year of search and assessments thereon would be completed u/s. 153A of the Act for those six assessment years.

(b) In respect of the year of search, notice u/s. 143(2) of the Act would be issued and assessment thereon would be completed u/s. 143(3) of the Act.

(c) In respect of concluded assessments prior to the year of search, no addition could be made in the relevant assessment year unless any incriminating material is found during the course of search with respect to the relevant assessment year.

(d) Pursuant to the search u/s. 132 of the Act, the pending proceedings would get abated. In respect of abated assessments, the total income needs to be determined afresh in accordance with the provisions of section 153A and other provisions of the Act.

6.4.1 The concluded assessments for the purpose of section 153A of the Act shall be —

(i) assessment years where assessments are already completed u/s. 143(1) and time limit

for issuance of notice u/s. 143(2) of the Act has expired or;

(ii) assessment years where assessments are already completed u/s. 143(3) of the Act ;

unless they are reopened u/s. 147 of the Act for some other purpose in both the scenarios stated above.

6.4.2 *The scheme of assessment proceedings contemplated u/s. 153A of the Act are totally different and distinct from the proceedings contemplated u/s. 147 of the Act and these procedures of assessment operate in different fields and have different purposes to be fulfilled altogether.*

6.4.3 *The expression 'assess or reassess' stated in section 153A(1)(b) has to be understood as below:-*

'assess' means assessments to be framed in respect of abated assessment years irrespective of the fact whether there are any incriminating materials found during the course of search with respect to relevant assessment years ;

'reassess' means assessments to be framed in respect of concluded assessment years where incriminating materials were found during the course of search in respect of the relevant assessment year."

10.3 *We also find that recently the Hon'ble Delhi High Court in the case ofCIT v. Kabul Chawla[2016] 380 ITR 573/[2015] 234 Taxman 300/61 taxmann.com 412 held as under:—*

'37. On a conspectus of section 153A(1) of the Act, read with the provisos thereto, and in the light of the law explained in the aforementioned decisions, the legal position that emerges is as under:

(i) Once a search takes place under section 132 of the Act, notice under section 153A(1) will have to be mandatorily issued to the person searched requiring him to file returns for six AYs immediately preceding the previous year relevant to the AY in which the search takes place.

(ii) Assessments and reassessments pending on the date of the search shall abate.

The total income for such AYs will have to be computed by the LD AOs as a fresh exercise.

(iii) The LD AO will exercise normal assessment powers in respect of the six years previous to the relevant AY in which the search takes place. The LD AO has the power to assess and reassess the 'total income' of the aforementioned six years in separate assessment orders for each of the six years. In other words there will be only one assessment order in respect of each of the six AYs "in which both the disclosed and the undisclosed income would be brought to tax".

(iv) Although Section 153A does not say that additions should be strictly made on the basis of evidence found in the course of the search, or other post-search material or information available with the LD AO which can be related to the evidence found, it does not mean that the assessment "can be arbitrary or made without any relevance or nexus with the seized material. Obviously an assessment has to be made under this Section only on the basis of seized material."

(v) In absence of any incriminating material, the completed assessment can be reiterated and the abated assessment or reassessment can be made. The word 'assess' in Section 153 A is relatable to abated proceedings (i.e. those pending on the date of search) and the word 'reassess' to complete assessment proceedings.

(vi) Insofar as pending assessments are concerned, the jurisdiction to make the original assessment and the assessment under Section 153A merges into one. Only one assessment

shall be made separately for each AY on the basis of the findings of the search and any other material existing or brought on the record of the LD AO.

(vii) Completed assessments can be interfered with by the LD AO while making the assessment under section 153A only on the basis of some incriminating material unearthed during the course of search or requisition of documents or undisclosed income or property discovered in the course of search which were not produced or not already disclosed or made known in the course of original assessment."

38. *The present appeals concern AYs 2002-03, 2005-06 and 2006-07, on the date of the search the said assessments already stood completed. Since no incriminating material was unearthed during the search, no additions could have been made to the income already assessed.'*

10.4 *We find that the decision relied upon by the ld DR in the case of CIT v. Anil Kumar Bhatia[2012] 211 Taxman 453/24 taxmann.com 98 (Delhi) does not in any manner advance the case of the revenue as admittedly the Hon'ble Delhi High Court in para 24 of its order had held as under:-*

"24. We are not concerned with a case where no incriminating material was found during the search conducted under section 132 of the Act. We, therefore, express no opinion as to whether Section 153A can be invoked even in such a situation. That question is therefore left open."

10.5 *The ld DR also relied on the recent decision of the Hon'ble Kerala High Court in the case of E. N.Gopakumar v. CIT (Central)[2016] 75 taxmann.com 215 in support of his contentions. We find that the decision of Hon'ble Delhi High Court in the case of Kabul Chawla (supra) had duly considered the decisions of Anil Kumar Bhatia case (supra) CIT v. Chetan Das Lachman Das[2012] 211 Taxman 61/26 taxmann.com 175 (Delhi); Madugula Venu v. DIT[2013] 215 Taxman 298/29 taxmann.com 200 (Delhi); Canara Housing Development Co. v. Dy. CIT[2014] 49 taxmann.com 98 (Kar.); Filatex India Ltd. v. CIT[2014] 229 Taxman 555/[2014] 49 taxmann.com 465 (Delhi); Jai Steel (India) v. Asstt. CIT[2013] 219 Taxman 223/36 taxmann.com 523 (Raj.); CIT v. Murli Agro Products Ltd.[2014] 49 taxmann.com 172 (Bom.); CIT v. Continental Warehousing Corpn. (Nhava Sheva) Ltd.[2015] 374 ITR 645/232 Taxman 270/58 taxmann.com 78 (Bom.) and All Cargo Global Logistics Ltd. v. Dy. CIT[2012] 37 ITD 287/23 taxmann.com 103 (Mum. Trib.) (SB).*

We also find that against the decision of the Hon'ble Delhi High Court in Kabul Chawla case (supra) (Delhi), the revenue preferred Special Leave Petition before the Hon'ble Supreme Court and the same was dismissed by the Hon'ble Apex Court which is reported in 380 ITR (St.) 4 (SC). Hence it could be safely concluded that the decision of Hon'ble Delhi HC in the case of Kabul Chawla (supra) would have to be considered on the impugned issue and in any case, the Hon'ble Supreme Court in the case of CIT v. Vegetable Products Ltd.[1973] 88 ITR 192 had held that if two reasonable constructions of a taxing provision are possible, that construction which favours the assessee must be adopted.

10.6 *We also find that the Hon'ble Jurisdictional High Court recently in the case ofPrincipal CIT v. Salasar Stock Broking Ltd. in G.A.No. 1929 of 2016 ITAT No. 264 of 2016 dated 24.8.2016 had endorsed the aforesaid view of Hon'ble Delhi High Court in Kabul Chawla's case and also placed reliance on its own decision in the case of CIT v. Veerprabhu Marketing Ltd. [2016] 73 taxmann.com 149 (Cal.).*

10.7 *We find that the provisions of section 132 of the Act relied upon by the ld DR would be relevant only for the purpose of conducting the search action and initiating proceedings u/s 153A of the Act. Once the proceedings u/s 153A of the Act are initiated, which are special proceedings, the legislature in its wisdom bifurcates differential treatments for abated assessments and unabated assessments. At the cost of repetition, we state that in respect of abated assessments (i.e pending proceedings on the date of search), fresh assessments are to be framed by the ld AO u/s 153A of the Act which would have a bearing on the determination of total income by considering all the aspects, wherein the*

existence of incriminating materials does not have any relevance. However, in respect of unabated assessments, the legislature had conferred powers on the ld AO to just follow the assessments already concluded unless there is an incriminating material found in the search to disturb the said concluded assessment. In our considered opinion, this would be the correct understanding of the provisions of section 153A of the Act, as otherwise, the necessity of bifurcation of abated and unabated assessments in section 153A of the Act would become redundant and would lose its relevance. Hence the arguments advanced by the ld DR in this regard deserves to be dismissed.

10.8 *In view of the aforesaid findings and respectfully following the judicial precedents relied upon hereinabove, we hold that the assessment already deemed to have been completed for the Asst Year 2009-10, which was unabated / concluded assessment, on the date of search, deserves to be undisturbed in the absence of any incriminating material found in the course of search and accordingly no fresh addition could be made thereon without the existence of any incriminating materials found in the course of search from the premises of the assessee. Since the issue is addressed on preliminary ground of absence of incriminating materials, we refrain to give our findings on the merits of the additions for the Asst Year 2009-10 in the case of Krishna Kumar Singhania. Accordingly the preliminary ground raised by the assessee in this regard is allowed.*

11.6 Based on the above, we hold that the revenue has to follow the procedures laid down under the provisions of section 153C of the Act in a situation where the documents were found from the premises of the 3rd party irrespective of the fact that the other party was also subject to the search. In other words, the process as provided under section 153C of the Act has to be followed by the revenue for the purpose of making the addition based on the documents found in the course of search from the premises of the 3rd party.

11.7 Coming to the facts of the case on hand, we note that the AO while making the addition in the hands of the assessee under section 68 of the Act nowhere mentioned about any material found from the premises of the assessee. The entire thrust of the AO to treat the credit of share capitals, premiums and loans as bogus and unexplained was based on materials and information collected during the search at third parties being Shri Shrish Chandrakant Shah, Shri Parveen Kumar Jain and Shri Partik R Shah and the premises of Shri Ashit Vohra and office of Shri Anil Hiralal Shah & others B-406, Wall Street-II Ellisbridge Ahmedabad. Therefore, in the circumstances, the materials could only have been made basis for making addition after following the procedure laid down under the provisions of section 153C of the Act which has not been followed. Thus, we do not find any

infirmity in the finding of the learned CIT (A). Hence, the grounds of appeals raised by the Revenue are hereby dismissed.

12. Since we have decided the issue on technical ground, we do not find necessary to give finding on the merit of the issue since all the other issues raised by the Revenue on merit become infructuous. Thus, the other grounds of appeal of the Revenue are also dismissed accordingly.

12.1 In the result, the appeal filed by the Revenue is hereby dismissed.

Coming to IT(SS)A No. 129 to 132/AHD/2021 for the A.Y. 2010-11 to 2013-14 by the Revenue.

13. At the outset we note that the issues raised by the Revenue in its grounds of appeal for the AY 2010-11 to 2013-14 are identical to the issues raised by the Revenue in IT(SS)A No. 128/AHD/2021 for the assessment year 2009-10. Therefore, the findings given in IT(SS)A No. 128/AHD/2021 shall also be applicable for the assessment years 2010-11 to 2013-14. The appeal of the Revenue for the assessment 2009-10 has been decided by us on technical ground vide paragraph No.11 to 12 of this order against the Revenue. The learned AR and the DR also agreed that whatever will be the findings for the assessment year 2009-10 shall also be applied for the assessment years 2010-11 to 2013-14. Hence, the grounds of appeal filed by the Revenue are hereby dismissed.

Coming to IT(SS) No. 133/AHD/2021 for A.Y. 2014-15 by the Revenue

14. The Revenue has raised following grounds of appeal:

1. On the facts and circumstances of the case and in law, the Ld. CIT(A) has erred in deleting the addition of Rs.5,60,00,000- made u/s 68 considering receipt of unsecured loans received from associated entities as unexplained cash credit, despite the assessee failed to prove the creditworthiness of creditor and genuineness of transaction as required u/s 68 and also without appreciating the fact that the Barter Group was engaged in providing accommodation entries.

2 On the facts and circumstances of the case and in law, the Ld. CIT(A) has erred in deleting the addition of Rs.11,20,000/- made u/s 69C being consequential in nature, despite the assessee failed to prove the creditworthiness of creditor and genuineness of transaction as required u/s 68 in respect of such unsecured loans on which expenses was claimed and also without appreciating the fact that the Barter Group was engaged in providing accommodation entries.

3. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) ought to have upheld the order of the A.O.

4. It is, therefore, prayed that the order of the Ld. CIT(A) be set aside and that of the A.O- be restored to the above extent.

15. The only issue raised by the Revenue is that the learned CIT(A) erred in deleting the addition made by the AO under section 68 of the Act on account of bogus credit of loan for Rs. 5.60 crores and addition of Rs. 11.20 Lakh being unexplained expenses incurred for taking such bogus entry.

16. The briefly stated facts are that during the year, the books of accounts of the assessee was credited by Rs. 5.6 crore from the associate enterprise namely M/s Deesha Tie Up Pvt. Ltd. The AO from the independent investigation found that the impugned party was showing very meager income throughout different assessment years, ranging between Rs. 1,44,820 to Rs. 2,40,720/- only. Thus, the credit worthiness of the party as well genuineness was not proved. The AO also found that the assessee group is engaged in the activity of accommodation entry, unaccounted share trading, market manipulation and real estate business. The unaccounted income generated from these activities are layered into the books of accounts of different entities controlled by the group. Thus, the AO treated the impugned credit of loan from M/s Deesha Tie Up Pvt. Ltd as unexplained cash credit under section 68 of the Act and added to the total income of the assessee.

17. The aggrieved assessee preferred an appeal before the learned CIT(A) who deleted the addition made by the AO by observing as under:

9.9 Having considered the material on record, it is noticed that the assessee has prima facie proved the identity of the depositor as the respective depositor was assessed with the same AO. Therefore, the identity of the creditor was proved beyond doubt. With regard to the genuineness of the transaction the appellant contended that the loan was taken through regular banking channels and the same has been accounted in the bank accounts of both the parties. With regard to the credit worthiness of the creditor the

appellant contended that the loan was taken through regular banking channel and there was no immediate cash deposits in the accounts of the creditor. The creditor is assessed with the same AO and in its case additions have also been made by the AO with regard to ine so-called accommodation entries. Therefore, no addition in the case of assesses can be made for the similar amount which has already been taxed once in the hands of the creditor. In fact the genuineness of the sources have to be examined in the hands of the creditor for the deposits taken by the appellant.

9.10 Since the identity, genuineness and creditworthiness of the depositor are proved by the assessee and hence the primary onus cast upon the assessee is discharged and the onus now shifted to the AO to show why the assessee's case could not be accepted and why it must be held that deposits though purporting to be in the name of third party still represents the income of the assessee from a suppressed source. In order to arrive at such a conclusion, the AO has to be in possession of sufficient and adequate material- Further the assessee cannot be presumed to have special notice about the source of source or origin of origin. Once the assessee has explained the source of the funds having come from the depositors as an explanation to support the deposits received, it is not expected from the assessee to explain the source of the source. Even if it is assumed that the depositor was unable to explain the nature and source of the funds received by them which were placed as deposits with the assessee than its unexplained amount could be treated as unexplained investment in the hands of the depositors u/s 69 or other section but could not be taxed in the hands of the assessee in absence of any evidence leading to the fact that the undisclosed income of the assessee has been ploughed back in its books of account by channelizing through the said depositor. In the instant case, there is no such finding by the AO that the deposits received by the assessee were representing the undisclosed income of the assessee which had been routed through the above said three depositors.

9.11 Although the AO has relied upon some seized material white making the addition which is not found from the assessee's premises. Since such seized record do not contain the name of the assessee, the seized material has no evidentiary value for making the addition in the case of the assessee- Thus, the papers found and seized from the possession of Shri Shrish Shah, Shri Pravin Kumar Jain and Shri Ashit Vora could not be treated as an evidence for taking any action in the case of the appellant in view of the judgment of Hon'ble Supreme Court in the case of CB1 vs. V.C. Shukla & Others whereby it has been held that the loose papers are no evidentiary value unless and until the authority brings on record any independent clinching material evidence in support of the said documents in the form of loose paper, etc. This principle and the ratio laid down by apex Court has been followed by Hon'ble Gujarat High Court in the case of DCJT (Assstt.} Vs. Prarthana Construction Pvt. ***Ltd. in*** *tax* ***appeal*** *No.79 of 2000 vide order dated 25.03.2001 and other judgments. Even there were no specific seized records found at the place of above persons demonstrating having taken any accommodation entry during the year under consideration by the appellant. In other words, the addition is not based upon any seized records found during the course of search at the above places.*

9.12 Further the AO has also mentioned that even if the addition of unaccounted income in the hands of the depositor have been made, it shall not affect the addition in the hands of the assessee and in support the AO relied upon two judgments. The AO's contention in this regard is examined and the reliance upon the judgments is found misplaced due to difference in facts of the instant case and of the cited cases.
9.13 Since the assessee has submitted the bank statement copies showing transactions having taken place through account payee cheques, copy of ITR and confirmations/contra ledgers etc. and hence the creditworthiness of the above creditor is established. In any case, the assessee would not know source of the source and origin of the origin as to from where the creditor got the funds. The Hon'ble Supreme Court in the Case of Lovely Exports

has held that if confirmations with PAN have been submitted by the assessee and the AO has any doubt, the AO may proceed against those shareholders but income cannot beadded in assessee's hands. Further, the ***Hon'ble Gujarat High Court in the case of CJT Vs. Ranchhod****Jivabhai****Nakhava in tax appeal No.50 of 2011 -208 Taxman 35 (Guj.)*** *has held that once the assessee submits creditors confirmation with PAN the onus shift to the AO.*

9.14 With regard to the reliance of the AO on papers found and seized from the premises of third parties it is noticed that his statements on the documents has not been brought on record by the AO and the assessee has not been provided the opportunity of cross-examination from the third parties and have not been provided the copy of their statements before making the addition in the case of the assessee. It is the legal requirement that no addition can be made without granting opportunity of cross-examination and providing copy of statement and finding of enquiries relied on while making the addition. The ***Hon'ble Gujarat High Court in the case of CIT Vs. Chartered Motors Pvt. Ltd. in Tax Appeal No.127 & 127 of 2015*** *has held that if the opportunity of cross-examination* ***was*** *not provided to the assessee, then the statements of the persons cannot* ***be read*** *against the assessee. Similar decision has been given by* ***Hon'ble Supreme Court in the case of Andaman Timber Industries vs. Commissioner of Central Excise, Kolkata (2015) 62 Taxman.com.***

9.15 The appellant filed confirmation, income tax return, transaction through regular banking channels &reflected in the books of accounts of both the parties, proved the genuineness of the transactions. The creditor had been assessed by the same AO and huge income has been determined in the hands of the creditor. This fact coupled with the fact that there is no cash deposit in the bank account of the creditor immediately before giving loan to the appellant, proved creditworthiness of the creditor. This fact shows that all the ingredients to prove the genuineness of credits have been complied with. Keeping in view the discussion above, the addition of Rs.5,60,00,0007- made by the AO u/s. 68 of the Act is not found justified. Moreover, the case of the appellant has been found covered by the following binding judgments of Hon'ble High Court of Gujarat, Ahmedabad.

i) DCIT vis. Rohini *Builders — 256* ***ITR 360*** *(Guj)*
ii) CIT v/s. RanchhodJivabhaiNakhava— 208 Taxman 35 (Guj)
iii) CIT v/s. Apex Therm Packaging P Ltd — 42 Taxman.com 473 (Guj)
iv) CIT v/s. Dharmdev Finance — (2014) 43 Taxman.com 395 {Guj) v) CIT v/s. Shailesh Kumar Rasiklal Mehta (2014) 41 Taxman.com 550/224 Guj)

9.16 Looking to the facts of the case, as narrated above and binding judgments, the addition made by the AO u/s. 68 amounting to Rs.5,60,00,000/-is not found justified, hence, the same is ***deleted.***

This ground of appeal is ***allowed.***

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10.2 I have considered the facts of the case and the submissions of the assessee carefully. The AO has made the addition of commission expenses of Rs.11,20,000/- in respect of unexplained cash credits on account of unsecured loans of which addition had been made u/s.68 of IT Act. The addition on account of unsecured loans has already been deleted hereinabove and hence this addition being consequential in nature is also hereby deleted.

18. Being aggrieved by the order of the learned CIT(A) the Revenue is in appeal before us.

19. The learned DR before us submitted that the assessee failed to discharge the onus imposed under section 68 of the Act by furnishing the necessary details.

20. On the contrary, the learned AR submitted that the assessee has discharged the onus imposed under section 68 of the Act. Thus, no addition is called for.

20.1 Both the ld. DR and the AR before us vehemently supported the order of the authorities below as favourable to them.

21. We have heard the rival contentions of both the parties and perused the materials available on record. The provisions of section 68 of the Act fastens the liability on the assessee to provide the identity of the lenders, establish the genuineness of the transactions and creditworthiness of the parties. These liabilities on the assessee were imposed to justify the cash credit entries under section 68 of the Act by the Hon'ble Calcutta High Court in the case of CIT Vs. Precision Finance (P) Ltd. reported in 208 ITR 465 wherein it was held as under:

> *"It was for the assessee to prove the identity of the creditors, their creditworthiness and the genuineness of the transactions. On the facts of this case, the Tribunal did not take into account all these ingredients which had to be satisfied by the assessee. Mere furnishing of the particulars was not enough. "*

21.1 Now, first we proceed to understand the identity of the party. The identity of the party refers existence of such party which can be proven based on evidence. As such the identity of a party can be established by furnishing the name, address and PAN detail, bank details, ITR etc.

21.2 The next stage comes to verify the genuineness of the transaction. Genuineness of transaction refers what has been asserted is true and authentic. A

genuine transaction must be proved to be genuine in all respect not merely on a piece of a paper. The documentary evidence should not be a mask to cover the actual transaction or designed in way to present the transaction as true but same is not. Genuineness of transaction can be proved by submitting confirmation of the parties along the details of mode of transaction but merely showing transaction carried out through banking channel is not sufficient to prove the genuineness. As such the same should also be proved by circumstantial surrounding evidence as held by the Hon'ble Supreme court in the case of Shri Durga Prasad More reported in 82 ITR 540 and in case of Smt. Sumati Dayal reported in 214 ITR 801.

21.3 The last stage comes to verify the creditworthiness of the parties. The term creditworthiness as per Black Law Dictionary refers as:

> *"creditworthy, adj. (1924) (Of a borrower) financially sound enough that a lender will extend credit in the belief default is unlikely; fiscally healthy-creditworthiness."*

21.4 Similarly in The New Lexicon Webster's Dictionary, the word "creditworthy" has been defined as under:-

> *"creditworthy, adj. of one who is a good risk as a borrower."*

21.5 It the duty of the assessee to establish that creditor party has capacity to advance such loan and having requisite fund in its books of account and banks. The capacity to advance loan can be established by showing sufficient income, capital and reserve or other fund in the hands of creditor. It is required by the AO to find out the financial strength of the creditor to advance loan with judicious approach and in accordance with materials available on record but not in arbitrary and mechanical manner.

21.6 In the light of the above discussion, we proceed to adjudicate the issue on hand. We find that during the assessment proceedings under section 153A of the Act, the details such as copy of PAN, ITR, ledger account, bank statement and confirmations from the loan creditorswere filed by the assessee. Furthermore, the AO of the loan creditor namely M/s Deesha Tie Up Pvt. Ltd and the assessee was the same and all the necessary details were already available with him about the

loan creditor. However, the AO without pointing out any deficiency in the above primary documents held that the assessee failed to explain the genuineness of the unsecured loan and creditworthiness of the creditor. The view of the AO was based on the fact that during the search proceedings, certain incriminating materials found from the premises of other person who were part of the group search were suggesting that the assessee group was engaged in unaccounted business activity wherein unaccounted cash was generated which have been utilized for making deposits in the bank of individuals and other entities controlled by the assessee group and the same amount was layered in the bank of the assessee in the form of unsecured loan. However, we find that those materials were neither found from the premises of the assessee nor belonging or pertaining to the assessee.

21.7 Moving further, we find that loan amount was credited from the party namely M/s Deesha Tie Up Pvt. Ltdwhich was also subject to same search proceeding and subject to the proceedings under section 153A of the Act. Therefore, the identity of the party was proved beyond doubt. The assesse has furnished copy of confirmation, transaction was carried out through banking channel, and other details such as books of account, financial statement etc. were available before the AO. The AO has not pointed out any defect in these materials, thus genuineness of transaction also got fulfilled. The AO doubted the creditworthiness merely on the basis that the loan party was showing meagre income in income tax return. In our considered opinion,as far as creditworthiness of the loan party is concerned, the same can be viewed from a different angle i.e. there may be funds in the form of capitals, reserve & surplus and loans. Undoubtedly, the learned CIT-A has given finding that huge additions were made in the assessment framed with respect to the loan party under the provisions of section 68 of the Act. If these additions are deleted by the higher forum, then it becomes evident that there was sufficient fund available with the loan creditors. Likewise, if these additions are confirmed by the higher forum, then also it becomes evident that there was sufficient fund available with the loan creditor. In

our considered view, in either of the case, the creditworthiness of the parties cannot be doubted.

21.8 Likewise, we find that in the case on hand, the credit of unsecured loan, the assessee is only liable to explain the source of credit in its books not in the books loan creditor. In the case on hand, the assessee has duly explained the source of credit in its books by providing the details of identity of the creditor, genuineness of transaction and creditworthiness was also established by furnishing details. The assessee cannot be expected to explain the source of funds in the books of the creditor and if the AO have any doubt with regard genuineness of fund in the books of creditor, then the same should be verified at the creditor end and not from the assessee.

21.9 In view of the above elaborate discussion and after considering facts in totality, we hereby hold that the assessee on merits discharged the onus cast under section 68 of the Act.Once the loan amount credited in the books of the assessee found to be genuine and addition under section 68 of the Act is deleted, in our considered view the corresponding estimated expenses against such loan cannot be sustained.

21.10 Moving further, the AO referred to the principles laid down by the Hon'ble Calcutta High Court in the case of M/s Trinetra Commerce & Trade (P.) Ltd. reported in 75 taxmann.com 70. However, in our considered opinion the principles laid down by the Hon'ble Calcutta High Court in above mentioned case cannot be applied in the given facts of the case. In that case, the persons who have acquired the shares in the company were not traceable and therefore the identity of those parties were not established. Once the identity was not established, the question of placing reliance on the genuineness of the transaction and creditworthiness of the parties does not arise. However, in the case on hand, the identity of the party who have given loan to the assessee was established beyond doubt and the same was also accepted by the revenue. Accordingly, we are of the view that the

principles laid down by the Hon'ble Calcutta High Court cannot be applied in the case on hand. Besides the above, there were contrary judgments available of Hon'ble Gujarat High Court in favour of the assessee involving identical facts and circumstances which are binding on us. Thus, we are reluctant to place reliance on the judgment of Hon'ble Calcutta High Court.

21.10 In view of the above and after considering the facts in totality we do not find any reason to interfere in the finding of the learned CIT(A). hence the grounds of appeal of the Revenue are hereby dismissed.

21.11 In the result appeal of the Revenue is hereby dismissed.

Coming to ITA NO. 1501/AHD/2015 an appeal by the assessee for A.Y. 2011-12

22. The assessee has raised following grounds of appeal:

1. Ld. CIT (A) erred in law and on facts in confirming addition made by AO of Rs. 6, 30, 00, 000/- in respect of share application money and Rs. 1, 50, 00, 000/- in respect of unsecured loans / deposits totaling to Rs. 7,80, 00, 000/- u/s 68 of the Act ignoring submission of appellant that appellant discharged onus by providing confirmation, PAN, bank statements, board resolution and complete address thus proving identity, credit worthiness and genuineness of share application money and loans / deposits. Ld. CIT (A) ought to have deleted addition of Rs.7, 80, 00, 000/- as appellant had discharged primary onus cast on him and amount had been received by account payee cheques. It be soheld now.

2. Ld. CIT (A) erred in law and on facts in confirming addition made by AO treating them as bogus without bringing any material on record against the appellant. Ld. CIT (A) ought not to confirm the addition as same is without any basis. It be so held now.

3. Ld. CIT (A) erred in law and on facts in confirming addition of Rs. 1, 50, 00, 000/- made by AO in respect of unsecured loans receivedfrom Sagar Infrastructure Pvt. Ltd merely on the basis of information received from ITO, Ward - 8(1), Ahmedabad without confronting same evidence to the appellant. Ld. CIT (A) ought to have deleted addition as material relied on by AO is not confronted to the appellant. It be soheldnow and addition be deleted.

4. Ld. CIT (A) erred in law and on facts in observing that appellant has not divulged its identity of Candour Pharma Pvt. Ltd at the time of assessment proceedings ignoring fact that appellant had submitted confirmation with PAN and address during assessment proceedings. Ld. CIT (A) ought to have deleted addition as appellant had discharged primary cast during assessment proceedings. It be so held now.

5. Ld. CIT (A) erred in law and on facts in not considering fact that appellant had satisfy primary cast on him regarding acceptance of unsecured loan and share application as laid down by jurisdictional high court.

6. Ld. CIT (A) ought to have deleted addition made by AO considering submissions / explanations submitted during assessment proceedings and appellate proceedings. It be so held now.

7. Ld. CIT (A) erred in law and on facts in observing non attendance by the appellant ignoring fact that ultimately same is attended by appellant through authorized representative and submitted all details.

8. Levy of interest u/s 234A, 234B, 234C & 234D of the act is not justified.

9. Initiation of penalty proceedings u/s 271 (l)(c) is unjustified
The appellant craves leave to add, amend, alter, edit, delete, modify or change all or any of the grounds of appeal at the time of or before the hearing of the appeal.

23. The only effective issue raised by the assessee is that the learned CIT(A) erred in confirming addition of Rs. 7.80 crores made by the AO by treating the credit of share application money and unsecured loan as unexplained cash credit under section 68 of the Act.

24. The facts in brief are that the assessee is private company and engaged in the activity of investment and trading in shares & securities. During the assessment proceedings, the AO found that the books of accounts of the assessee was credited by share application money of Rs. 6.30 crores and unsecured loan of Rs. 11.50 crores. The assessee to explain the source made certain submission before the AO. The AO on verification of the submission made by the assessee found that the share application money was credited by 3 companies and as per their board resolution copy, share application money was made for Rs. 5.80 crores only which is detailed as under:

Sr.No.	Name of the subscriber	Amount(Rs.) subscribed
1.	Shri Ganesh Spinners Ltd	50,00,000/-
2.	M/s.Empower Industries (I) Ltd	2,75,00,000/-
3.	M/s.S.R Plastic (I) Pvt.	2,55,00,000/-

	Ltd.	
	Total	5,80,00,000/-

25. The AO to further verify the genuineness of credit of share application money and unsecured loans issued notices under section 133(6) of the Act. But in case of all three parties from whom share application was money received and one party namely M/s Sagar Infrastructure P. Ltd from whom loan of Rs. 1.5 crore was received, the notices were returned as unserved with the remark left/not claimed/not known. Thus, the AO required the assessee to furnish the bank statement and bank books of the above-mentioned parties and also requiredtoproduce the director of M/s Sagar Infrastructure P. Ltd but the assessee failed to comply the same. However, on later date, a simple confirmation letter was received from all these parties through post in which the AO noted certain discrepancies as detailed under:

- The notices under section 133(6) of the Act issued to these parties were returned as unserved, then how these parties felt necessary to post confirmation letter.
- The party namely M/s Shree Ganesh Spinners Ltd which allegedly credited share application money for Rs. 50 lakh sent confirmation letter from Mumbai whereas as per the address given by the assessee, the impugned party is based in Hyderabad.
- As per form 3CD of the Tax Audit Report, a loan amount of Rs. 1.5 crore shown to have received from M/s Sagar India Pvt. Ltd but in the balance sheet loan was shown from M/s Sagar Infid Pvt Ltd whereas confirmation letter was filed in the name of M/s Sagar Infrastructure Pvt. Ltd. To verify the genuineness of loan, departmental commission was deputed at M/s Sagar Infrastructure Pvt. Ltd and as per report submitted by ITO ward 8(1) Ahmedabad, the impugned party in his books of account has shown total loans and advances of Rs. 16,02,922/- only which does not include the name of the assessee.

25.1 Thus, the AO in view of the above treated the credit of share application money of Rs. 6.30 crores and loan of Rs. 1.50 crores as unexplained credit under section 68 of the Act and added to the total income of the assessee.

26. The aggrieved assessee preferred an appeal before the learned CIT(A).

26.1 The assessee before the learned CIT(A) submitted that the AO without having material evidence treated the share application money for Rs. 6.3 crores and unsecured loan of Rs. 1.5 crores as bogus. The AO ignored the fact the amounts on account of share application money and unsecured loan was received through account paying cheque. Further, in case of credit of share application money primary documents being share application form along with confirmation letter and PAN of the applicants were duly furnished. Likewise, in case of unsecured loan complete address, copy of PAN, confirmation and bank statement of creditor was furnished. All the parties being share applicants and loan creditors independently confirmed the transaction by sending direct post to the AO. Therefore, the primary onus cast under section 68 of the Act was duly discharged but the AO still proceeded with to treat such credits as bogus which needs to be deleted.

27. However, the learned CIT(A) found that the assessee received share application money from 4 parties whereas during the assessment proceeding furnished copy of board resolution and confirmation from 3 parties only. All three-board resolution are in identical language and font. The address of share applicant and loan creditor provided were also not correct as the notices issued under section 133(6) were returned as unserved. As per the report furnished by the AO of the loan party namely Sagar Infrastructure P. Ltd, the alleged loan credited to assessee was not found in balance sheet of the impugned party. The learned CIT(A) also found that no new evidence was produced before him.

27.1 Thus, the learned CIT(A) in view of the above held that the assessee failed to discharge the onus cast under section 68 of the Act regarding identity, genuineness and credit worthiness. Accordingly, the learned CIT(A) confirmed the addition made by the AO.

28. Being aggrieved by the order of the learned CIT(A), the assessee is in appeal before us.

29. The learned AR before us filed the paper book and the additional paper book running into pages from 1 to 111 and 1 to 211 and further contended that confirmation from all the parties along with PAN, share application form and board resolution were duly furnished during the assessment proceedings. Thus, it was contended by the learned AR that the assessee discharges its onus upon it by furnishing the primary documents. The learned AR further submitted that the additional documents filed during the hearing were to strengthen the case of the assessee. Furthermore, the authorities below could have obtained the copies of the income tax return from the portal of the income tax Department. As such these documents cannot be treated as additional documents to decide the issue at hand. As such, these documents should not be sent to the AO for further adjudication and consideration.

29.1 The learned AR with respect to the loan taken from the company namely Sagar Infrastructure P. Ltd contended that the report obtained from the AO of Sagar Infrastructure P. Ltd was not provided to the assessee for its rebuttal and therefore the same cannot be used to draw any inference against the assessee.

30. On the other hand, the learned DR vehemently supported the order of the authorities below.

31. We have heard the rival contentions of both the parties and perused the materials available on record. In the present case, the assessee has shown receipt

of share application money amounting to Rs. 6.3 crores in the year under consideration from the parties as detailed below:

1. Shri Ganesh Spinners Ltd Rs. 50,00,000/-
2. Empower Industries India Ltd Rs. 2,75,00,000/-
3. SR Plastic (India) Pvt. Ltd Rs. 2,55,00,000/-
4. Candour Pharma Pvt. Ltd. Rs. 50,00,000/-

31.1 Likewise, the assessee inter-alia has also shown the receipt of a loan amounting to ₹1.50 crores from the party namely Sagar Infrastructure P. Ltd in the year under consideration.

31.2 The above credit of share application money and unsecured loan has been treated as unexplained credit under section 68 of the Act by the AO which also confirmed by the learned CIT(A).

31.3 The provision of section 68 of the Act cast burden on assessee to explain the nature and sources of any sum credited in the books of account to the satisfaction of the AO. If the assessee failed to offer an explanation or the explanation offered by the assessee is not found satisfactory by the AO, then such credit shall be deemed as income of the assessee. The Hon'bleSupreme Court in the case of CIT vs P Mohankala reported in 291 ITR 278 defined the expression explanation not offered or not found to be satisfactory, the relevant observation of the Hon'ble court is extracted as under:

> *The expression 'the assessees offer no explanation' means where the assessees offer no proper, reasonable and acceptable explanation as regards the sums found credited in the books maintained by the assessees. It is true that the opinion of the Assessing Officer for not accepting the explanation offered by the assessees as not satisfactory is required to be based on proper appreciation of material and other attending circumstances available on record. The opinion of the Assessing Officer is required to be formed objectively with reference to the material available on record. Application of mind is the sine qua non for forming the opinion. [Para 14]*

31.4 Thus, what is inferred from the above is that the primary onus cast upon the assessee to make reasonable and acceptable explanation. Once primary onus

discharged by the assessee the burden shift on the AO to disprove the explanation offered by the assessee based on proper appreciation of material facts and circumstances available on record. Without application of mind and making proper inquiry, the primary evidence furnished by the assessee cannot be brushed aside merely on surmise and conjecture. Over the year the judicial authority has laid principle that sources of sum credited held to be explained if assessee furnishes evidence regarding identity of creditor, genuineness of transaction and creditworthiness of the creditor.

31.5 In the case on hand,the assessee regarding the credit of share application money of Rs. 6.3 crores furnished copy of share application form containing all details of the parties, confirmation letter of the parties and copy of Board resolution passed by the board of the share applicant. All these parties independently sent confirmation letters to the AO by post. The lower authorities merely on surmises and conjecture doubted the copy of board resolution and copy of confirmation sent by the parties. Further, the AO had details of PAN and was very much empowered to collect the income detail of the parties but without making inquiry rejected the primary document.

31.6 Bethat as maybe we note that the assessee at the time of hearing before us has filed additional evidence with the request vide letter dated 12-03-2019 to admit the same. The additional evidence submitted before us are detailed as under:

2	*Empower Industries India Ltd.* *Bank Statement* *Income Tax Return*
3	*Candour Pharma Pvt. Ltd.* *Bank Statement* *Income Tax Return*
4	*Sagar Infrastructure Pvt. Ltd.* *Income Tax return*
5	*Annual Accounts of Ganesh Spinners Ltd.*
6	*Annual Accounts of Empower India Ltd.*

31.7 The rule 29 of ITAT Rules deals with the admission of the additional evidence filed by the parties which reads as under:

> *[**Production of additional evidence before the Tribunal.***
>
> ***29.** The parties to the appeal shall not be entitled to produce additional evidence either oral or documentary before the Tribunal, but if the Tribunal requires any document to be produced or any witness to be examined or any affidavit to be filed to enable it to pass orders or for any other substantial cause, or , if the income-tax authorities have decided the case without giving sufficient opportunity to the assessee to adduce evidence either on points specified by them or not specified by them, the Tribunal, for reasons to be recorded, may allow such document to be produced or witness to be examined or affidavit to be filed or may allow such evidence to be adduced.]*

31.8 On perusal of the additional evidence filed by the assessee, it is noted that all these evidences were pertaining to or belonging to the 3rd parties. In other words, the evidences were collected by the assessee from the 3rd parties, meaning thereby, these additional evidences were not readily available with the assessee. Indeed, it is a time-consuming job to collect the evidence from the 3rd parties. Furthermore, the additional evidencesas discussed above are crucial to decide the issue in hand. Therefore, in the interest of justice and fair play, we admit the additional evidences for deciding the issue on hand accordingly we proceed to adjudicate the same.

31.9 The additional evidence includes bank statement of share applicant showing amount transferred to assessee, copy of annual account and ITR. Except the bank statement, the other documents being copy of ITR and annual account of the parties, the AO may have easily obtained from the ITD portal.

31.10 Thus, considering the primary document submitted by the assessee before the lower authorities and additional evidencefurnished before us, we are of the opinion that the assessee is able to explain the sources of credit of share application money. Hence, the addition to the extent of credit of share application money needs to be deleted.

31.11 Coming to the credit of unsecured loan from M/s Sagar Infrastructure Pvt Ltd., we note that the assessee has received a sum of ₹1.50 crores as evident

from the bank statement placed on page 53 of the paper book. However, as per the report obtained by the AO from the AO of Sagar Infrastructure P. Ltd, it was revealed that the party namely Sagar Infrastructure P. Ltd has not shown any loan to the assessee. Thus, the addition was made by the AO which was subsequently confirmed by the learned CIT-A. Thus, it is transpired that the basis adopted by the AO for the addition of unsecured loan was the report obtained from the AO of Sagar Infrastructure P. Ltd. However, we note that the report was not provided to the assessee for its rebuttal which is prerequisite for deciding the issue against the assessee.

31.12 Be that as it may be, the undisputed fact is that the loan received has been repaid by the assessee in the subsequent year. This fact can be verified from the financial statement of assessee and the relevant extract is reproduced above:

Particulars	*As at 31 March, 2014*	*As at 31 March, 2013*
**********		
Note 4 Short-term borrowings Loans repayable on demand		
Sagar Infid Pvt. Ltd.		*15,000,000*

31.13 Therefore, in our considered view once the repayment of the loan received is established, then the genuineness cannot be doubted. In this respect we find support and guidance from the judgment of Hon'ble Gujarat High Court in the case of the CIT Vs. Rohini builders reported in 256 ITR 360 wherein it was held as under:

> *"The genuineness of the transaction is proved by the fact that the payment to the assessee as well as repayment of the loan by the assessee to the depositors is made by account payee cheques and the interest is also paid by the assessee to the creditors by account payee cheques."*

31.14 We also feel pertinent to refer the judgment of the Hon'ble Gujarat High Court in case CIT vs. Ayachi Chandrashekhar Narsangji reported in 42 taxmann.com 251 where it was held as under:

It is required to note that as such an amount of Rs. 1,00,00,000 vide cheque No. 102110 and an amount of Rs. 60 lakhs vide cheque No. 102111 was given to the assessee and out of the total loan of Rs. 1.60 crores, Rs. 15 lakhs vide cheque no. 196107 was repaid and therefore, an amount of Rs. 1,45,00,000 remained outstanding to be paid to IA. It has also come on record that the said loan amount has been repaid by the assessee to 'IA' in the immediately next year and the Department had accepted the repayment of loan without probing into it. In the aforesaid facts and circumstances of the case, when the Tribunal has held that the matter is not required to be remanded as no other view would be possible, there was no reason to interfere with the impugned order passed by the Tribunal. [Para 6]

31.15 In view of the above elaborated discussion and after considering the facts in totality, we hereby hold that the assessee discharged the onus cast under section 68 of the Act. Hence, we do not find any reason to uphold the finding of the learned CIT(A). Thus, the ground of appeal of the assessee on merit is hereby allowed.

32. In the result,the appeal of the assessee is allowed.

Coming to IT(SS)A No. 181/AHD/2021 an appeal by the Revenue for the A.Y. 2009-10 in case of Neminath Traders Pvt. Ltd.

33. The Revenue has raised following grounds of appeal:

1. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in deleting the additions made by the AO in the order u/s 143(3) r.w.s 153A on legal grounds that the additions should have been made u/s 153C, without appreciating the fact that provisions of section 153C empowers the Assessing Officer to assess or re-assess the income of the person other than searched person, but the assessee being searched person was squarely covered under section 153A.

2. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in accepting the contention of the assessee that the assessment u/s 153A is to be made solely on the incriminating material found during the search carried out in the case of the concerned assessee and has failed to appreciate that it has added words in Section 153A, which is not permissible in law.

2.1. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in holding that any addition during the assessment u/s.153A has to be confined to the incriminating material found during the course of search u/s. 132(1) of the Act, even though, there is no such stipulation in sec.153Aofthe Act.

2.2. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred by not considering the decision of Hon'ble Jurisdiction High Court in its proper perspective in the case of Pr.CIT Vs. Saumya Construction P.Ltd. 387 ITR 529 (Guj), as this judgment lays the principle that assessment should be connected with something found during the search or requisition, viz. incriminating material which reveals undisclosed income. This decision nowhere states that addition u/s 153A can only be made if incriminating material is found during search from the premises of the concerned assessee.

2.3 On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in not appreciating that sec.153A requires a notice to be issued requiring the assessee to furnish his return of income in respect of each assessment year falling within six assessment years and to assess or re-assess the total income of those six assessment years, and that the scheme of assessment or re-assessment of the total income of a person searched will be brought to naught if no addition is allowed to be made for those six assessment years in the absence of any seized incriminating material.

2.4. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in not appreciating that while computation of undisclosed income of the block period u/s.158BB was to be made on the basis of evidence found as a result of search or requisition of books of accounts, there is no such stipulation in sec.153A and sec.153BI specifically states that the provisions of Chapter-XIV-B, under which sec.158BB falls, would not be plied where a search was initiated u/s.132 after 31/5/2003.

2.5. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in not appreciating that assessment in relation to certain issues not related to the search and seizure may arise in any of the said six assessment years after the search u/s. 132 is conducted in the case of the assessee, and that if the interpretation of the Id. CIT(A) were to hold it will not be possible to assess such income in the 153A proceedings, while no other parallel proceedings to assess such other income can be initiated, leading to no possibility of assessing such other income, which could not have been the intention of the legislature. Further, the AO is duty bound to assess correct income of assessee as held by the Hon'ble Apex Court in the case of Mahalaxmi Sugar Mills, 160 ITR 920(SC).

2.6. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in not appreciating that in all the assessments framed u/s 153A, authorization u/s 132 was issued and incriminating material was found during the course of search in the premises controlled by the searched group which directly belong to the concerned assessee.

3. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has misinterpreted and extrapolated the judgment of Hon'ble Delhi High Court in the case of CIT Vs. Kabul Chawla, 380 ITR 573 (Del) as this judgment lays the principle that an assessment has to be made under this section only on the basis of seized material and the assessment cannot be arbitrary. This decision also nowhere states that addition u/s 153A can only be made if incriminating material is found during search from the premises of the concerned assessee.

3.1. On the facts and circumstances of the case and in law, the Ld.CIT{A) has erred in not appreciating the decisions of Hon'ble Delhi High court in the case of CIT Vs Anil Kumar Bhatia [211 Taxman 453, 352 ITR (493)] & Kerala High Court in the case of E.N. Gopakumar vs. Commissioner of Income-tax (Central) [2016] 75 Taxmann.com 215 (ker.) wherein Courts held that assessments in a search case can be concluded against interest of assessee including making additions even without any incriminating material being available against assessee in search under section 132.

4. On the facts and circumstances of the case and in law, whether by the order of the Ld.CIT(A), it has erred in its interpretation of Section 153A by holding that separate assessments have to be framed u/s 153A as well as 153C for the same assessee for the same assessment year who has been searched u/s 132, depending upon the number of premises where incriminating materials were found belonging to the assessee from various premises controlled by the "assessee group"? Thus, as held by the Ld.CIT(A), the question is "is it permissible to have parallel assessment proceedings u/s 153A as well as 153C to be carried out in each case for each assessment year, resulting into 'n' number of assessment orders for each assessee for each year which is totally contrary to the provisions of the

Act as Section 153A clearly states that there will be one assessment order for each year in case of an assessee subjected to search u/s.132".

5. On the facts and circumstances of the case and in law, whether the Ld.CIT(A) has erred while quashing the order u/s 153A stating that no incriminating material has been found from the searched premises of the concerned assessee, without appreciating the fact that incriminating materials were found and seized from various other premises managed and controlled by the assessee and are duly covered u/s 132 of the IT. Act, 1961?

6. Whether the Ld. CIT(A) has erred in law and on facts while deleting the addition of Rs.2,79,50,000/- made on account of unexplained share capital/share premium, u/s 68 of the, on legal grounds, without going into the merits of the issue, despite the assessee had failed to prove the genuineness of the transaction and creditworthiness of the persons/entities from whom the funds were obtained and identity of the creditor, nor the assessee raised any such legal ground during the course of assessment proceedings before the Assessing Officer.

7. Whether the Ld, CIT(A) has erred in law and on facts while deleting the addition of Rs.5,59,000/- made u/s 69C on account of unexplained expenditure incurred on the unexplained share capital/share premium, on legal grounds, without going into the merits of the issue, despite the assessee had failed to prove the genuineness of the transaction and creditworthiness of the persons/entities from whom the funds were obtained and identity of the creditor, nor the assessee raised any such legal ground during the course of assessment proceedings before the Assessing Officer.

8. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) ought to have upheld the order of the A.O.

9. It is, therefore, prayed that the order of the Ld. CIT(A) be set aside and that of the A.O. be restored to the above extent.

34. The effective issue raised by the Revenue is that the ld. CIT-A erred in deleting the addition made by the AO for Rs. 2,79,50,618/- under section 68 of the Act and corresponding expenses under section 69C of the Act for Rs. 5,59,000/- only by holding the assessment under section 153A of the Act can be only based on incriminating material found during the search.

35. The facts in brief are that the assessee is a private company and claimed to be engaged in the business of Investment, financing and renting of immovable property. There was a search action under section 132 of the Act dated 04-12-2014 carried out at the premises of "Barter/ Accommodation Entry Provider Group" and the assessee being part of the group was also subject to such search proceedings. As a result of the search, the proceedings under section 153A of the Act were initiated vide notice dated 11-08-2015 and in response to which the

assessee declared income at Rs. NIL in the return filed under section 153A of the Act.

35.1 The AO during the assessment proceedings under section 153A of the Act found that the assessee over the period has received accommodation entry in the form of share capitals along with premium from the entities controlled and managed by the entry provider namely Shri Shrish Chandrakant Shah and Shri Parveen Kumar Jain. In addition to the above, the assessee also received share capital along with premiums from other parties. The AO in holding so referred the documents found and statement recorded during the independent search carried at the premises of Shri Shirish Chandrakant Shah and Parveen Kumar Jain. The AO also found the documents found from the above-mentioned parties co-relate with the documents found during the search at the assessee group i.e. from the office of Shri Anil Hiralal Shah- a key person of the group, situated at B-406, Wall Street-II Ellisbridge, Ahmedabad marked as page 224 &247 of Annexure A-1. Accordingly, the AO treated the credit of Share capital along with premium received during the year under consideration for Rs. 2,79,50,000/- as unexplained cash credit under section 68 of the Act and added to the total income of the assessee. The AO also worked out expenses incurred for taking such accommodation entries of shares capital and premium @ 2% i.e. Rs. 5,59,000/- added to the total income of the assessee under section 69C of the Act.

36. On appeal by the assessee, the learned CIT(A) deleted that the addition made by the AO by holding that no material of incriminating nature was found from the premises of the assessee. The material found from the premises of third cannot be utilized against the assessee for making assessment under section 143(3) r.w.s. 153A of the Act.

37. Being aggrieved by the order of the learned CIT(A), the Revenue is in appeal before us.

38. The learned DR before us submitted that once a search has been conducted under section 132 of the Act, it is mandatory for the AO to frame the assessment under section 153A of the Act for the six years preceding the year of search and the year of search. Likewise, as per the ld. DR, there is no prohibition from using the documents found on the premises of the third parties while framing the assessment.

39. On the contrary, the learned AR before us submitted that the year being unabated assessment year, the same cannot be disturbed in the search proceedings under section 153A of the Act. As per the ld. AR, the assessment under search proceedings is limited to the extent of the incriminating documents found on the premises of the search person. As such, there was no document found from the premises of the search person, therefore, no addition can be made.It was also contended by the learned AR that the document found from the premises of the 3rd party in the search under section 132 of the Act belonging/pertaining to the assessee cannot be used against the assessee without following the procedures laid down under the provisions of section 153C of the Act.

39.1 Both the ld. DR and the AR before us vehemently supported the order of the authorities below as favourable to them.

40. We have heard the rival contentions of both the parties and perused the materials available on record. Admittedly, the issue before us arises from the assessment framed under section 143(3) r.w.s. 153A of the Act in pursuance to the search proceeding carried out under section 132 of the Act dated 4th December 2014. The year under consideration i.e. A.Y. 2009-10 is completed/unabated assessment year. It is the settled position of law that in the proceedings under section 153A of the Act, the assessment can only be made based on incriminating materials found/collected during the search from the premises of the assessee. we have also taken similar view vide paragraph No. 11

of this order in case of group concern namely Real Marketing Pvt Ltd bearing IT(SS) A No. 128/AHD/2021. For detailed discussion, please refer to the aforesaid paragraph of this order.

40.1 Coming to the facts of the case on hand, the AO treated the credit of share capital along with premium thereon as unaccounted/undisclosed income of the assessee brought in the books in the guise of bogus/accommodation transaction. The entire thrust of the AO for holding so was based on outcome of an independent search proceeding carried out at Shir Shrish Chandrakant Shah and Shri Parveen Kumar Jain where it has been unearthed that both the above personsare engaged in the activity of providing bogus/accommodation entry in the form of loan, capital and LTCG or STCG etc. through web of paper companies managed and controlled by them. The AO found that the assessee company has received share application money along with premium from the companies controlled and managed by the above-named alleged entry provider. As per the AO, there was incriminating material found from the premises Shri Shrish Chandrakant Shah corroborating with the pages bearing 224 & 247 of annexure A-1 found from office of Anil Hiralal Shah key person of the group.

40.2 Regarding the finding of the AO, we note the AO lost the sight to the fact there was no amount of whatsoever in the form of share capital and premium received by the assessee from the concern of alleged entry provider Shri Shrish Chandrakant Shah and Parveen Kumar Jain. The amount of share capital and premium for Rs. 2,79,50,000/- which was subject to the addition was received from M/s TPL Finance Ltd which as per own finding of the AO was not connected to the alleged entry provider namely Shri Shrish Chandrakant Shah and Parveen Kumar Jain. The relevant finding of the AO reads as under:

ACCOMMODATION ENTERIES RECEIVED THROUGH COMPANIES

- *Apart from the companies managed by Shri Shirish Chandrakant Shah and Shri Praveen Kumar Jain, it is seen that share capital at high premium was received in the assessee-company of Barter Group.*
- *Share capital at high premium received & reflected in balance sheet of assessee (during F.Ys From 2008-09 to 2013-14 are tabulated hereunder:*

Sr.N	*Name of the*	*Name of the*	*Address of the*	*No.Shar*	*Total*	*Financial*

o	*company of Barter group which has received funds recorded in books as share capital/premium*	*allottee as per Form 2 filed by company at Column (2) from funds as recorded in coloumn (6) have been received by companies at Column(2)*	*allotee as per Form 2 filed by company at Column(2)*	*e issued*	*funds received as per books of accounts of company at column(2)*	*Year of receivep of funds as per books of accounts of company at column(2)*
1.	*Neminath Trades Private Limited*	*STONEY COMMERCIAL PRIVATE LIMITED*	*13C BECHU CHATTERJEE STREET, KOLKATA-700009.*	*500000*	*40000000*	*2010-11*
2.	*Neminath Trades Private Limited*	*YASHITA TRADING CO. PRIVATE LIMITED*	*RN 4, 3rd FLOOR, DOSHI BHAVAN,170.172 ,2 ND MARUTU LANE, BORA BAZAR, FORT, MUMBAI-400001*	*375000*	*30000000*	*2010-11*
3.	*Neminath Trades Private Limited*	*TPL Finance Limited*	*¼, Mittal Chambers, Niharika park, Opp. UCO Bank, Khanpur, Ahmedabad*	*279500*	*27950000*	*2008-09*

40.3 As such, there is no material whatsoever found or available on record in connection with the credit of share application money and premium from M/s TPL Finance Ltd.Therefore, in the light of the above discussion and settled position of law that in the proceedings under section 153A of the Act no assessment/reassessment can be made in the absence of incriminating material found during the search. Thus, we do not find any reason to interfere in the finding of the learned CIT(A). Hence, the grounds of appeal of the Revenue are hereby dismissed.

41. In the result, appeal of the revenue is hereby dismissed.

Coming to IT(SS)A No. 182/AHD/2021to 2010-11 by the Revenue in case of Neminath Traders Pvt Ltd.

42. The effective issue raised by the Revenue is that the ld. CIT-A erred in deleting the addition made by the AO only by holding that the assessment under section 153A of the Act can be only based on incriminating material found during the search.

43. The necessary facts are that the AO in the assessment famed under section 143(3) r.w.s. 153A of the Act made addition to the total income of the assessee as detailed below:

i) Unexplained cash credits u/s.68 (para 10)	*Rs.30,73,00,000/-*
ii) Unexplained expenditure u/s.69C (para 10)	*Rs.61,46,000/-*
iii) Unexplained investment u/s.69(para 11)	*Rs.1,60,00,000/-*
iv) Unexplained payment/expenses (para 12)	*Rs.20,00,00,000/-*
Assessed Income	*Rs.52,94,46,000/-*

44. On appeal by the assessee the learned CIT(A) deleted that the addition made by the AO by holding that no material of incriminating nature was found from the premises of the assessee. The material found from the premises of third cannot be utilized against the assessee for making assessment under section 143(3) r.w.s. 153A of the Act.

45. Being aggrieved by the order of learned CIT(A) the Revenue is in appeal before us.

46. The learned DR before us submitted that once a search has been conducted under section 132 of the Act, it is mandatory for the AO to frame the assessment under section 153A of the Act for the six years preceding the year of search and the year of search. Likewise, as per the ld. DR, there is no prohibition from using the documents found on the premises of the third parties while framing the assessment.

47. On the contrary, the learned AR before us submitted that the year being unabated assessment year, the same cannot be disturbed in the search proceedings under section 153A of the Act. As per the ld. AR, the assessment under search proceedings is limited to the extent of the incriminating documents found on the premises of the search person. As such, there was no document found from the premises of the search person, therefore, no addition can be made. It was also contended by the learned AR that the document found from the premises of the 3rd party in the search under section 132 of the Act belonging/pertaining to the assessee cannot be used against the assessee without following the procedures laid down under the provisions of section 153C of the Act.

47.1 Both the ld. DR and the AR before us vehemently supported the order of the authorities below as favourable to them.

48. We have heard the rival contentions of both the parties and perused the materials available on record. Admittedly, the AO in the assessment order under section 143(3) r.w.s. 153A of the Act made different types of addition which have been deleted by the learned CIT(A). We hereby proceed to adjudicate the same in the manner detailed below.

48.1 The first addition Rs. 30.73 crore made on account of credit of share application money along with premium. The AO alleged that the entities from which share application money was received include entities controlled and managed by the alleged entry provider namely Shri Shrish Chandrakant Shah and Parveen Kumar Jain besides credit of share application money of other entities. The basis of the allegation of the AO is finding of independent search proceeding carried at above named persons where certain materialswere found, and statement of various persons were recorded. The AO also alleged that an excel sheet found from the computer of Shri Shirish Chandrakant Shah contained the cash transaction in the name of Barter-group was corroborating with the page 224

and 247 of annexure A-1 which was found and seized from B-406, Wall Street-II Ellisbridge (panchnama includes name of the assessee) which contains the unaccounted transaction with Shri Shrish Chandrakant Shah and the assessee.

48.2 In this regard, we note that amount of addition under section 68 of the Act also includes credit from entities not controlled and managed by the so-called entry provider namely Shri Shrish Chandrakant Shah and Parveen Kumar Jain. However, no such bifurcation was given by the AO while treating the same as unexplained cash credit. It is undisputed fact that no material of whatsoever be it incriminating or not, was found from the premises of the assessee or other are on record in the connection with the amount of share application money credited from entities not controlled by the Shri Shrish Chandrakant Shah and Parveen Kumar Jain. Therefore,in our considered opinion no addition can be made on account of amount credited from entities which are not controlled and managed by the Shri Shrish Chandrakant Shah and Parveen Kumar Jain.

48.3 Coming to the amount credited from the entities alleged to be controlled and managed by the Shri Shrish Chandrakant Shah and Parveen Kumar Jain. In this regard we note that the AO referred the page 224 and 247 of annexure A-1 found form B-406, Wall Street-II Ellisbridge and Panchanamawas drawn on such premises including the name of the assessee. However, on perusal of impugned pages i.e. 224 and 247, we note that same contain heading Shrish and below that some amount date wise is noted in coded from against the name of the assessee. From the analysis of the impugned page on standalone basis, one cannot find out the nature of transaction. Thus, the same re-presents non-speaking material and therefore the same to be treated as dumb document for the purpose of assessment unless same is read in conjunction with excel sheet found from Shrish Chandrakant Shah then it seems that amount was paid to Shrish Chandrakant. Hence, what has been inferred here that the main document which the AO relied on is the excel sheet found from Shri Shrish Chandrakant Shah in a completely independent search which cannot be used against the assessee in the proceeding

under section 153A of the Act. As such, to use such material found from Shri Shirish Chandrakant Shah and finding from the search proceeding at Shri Parveen Kumar Jain, the AO must have to follow the procedure prescribed under section 153C of the Act. In this regard a detailed discussion has been made by us vide paragraph no 11 to 11.7 of this order.

48.5 Be that as it maybe, the impugned page numbers 224 and 247 of annexure-AI contain transactions which fall under the period A.Y. 2011-12 and 2012-13 whereas the year under consideration is A.Y. 2010-11. Thus, no material of incriminating nature was found during the search conducted on the assessee in reference to the year under consideration which could have been made basis of making the addition of impugned credit of share application money along with premium.

48.6 The remaining addition of Rs. 61.46 Lacs, Rs. 1.6 crores and Rs. 20 crores respectively are made basedoncertain document found from the residence of Shri Ashit Vohra part of Barter-Group to which the assessee company belong. However, we note that the panchanama drawn regarding material seized from his residential premises does not include the name of the assessee company. Therefore, the search carried at the premises of Shri Ashit Vohra isan independent search for the assessee company. Hence, the material found from the residence of Shri Ashit Vohra cannot be utilized for making addition in the hands of the assessee company in the proceeding under section 153A of the Act unless and until procedure prescribe under section 153C of the Act is followed. We have given identical findingvide paragraph no 11 to 11.7 of this order in case of group concern namely Real Marketing Pvt Ltd bearing IT(SS) A No. 128/AHD/2021. For detailed discussion, please refer the afore-said paragraph of this order.

48.7 In view of the above and after considering the facts in totality, we do not find any reason to interfere in the finding of the learned CITA(A). Hence, the grounds of appeal of the Revenue are hereby dismissed.

49. In the result, the appeal of the Revenue is hereby dismissed.

50. In the combined results of the appeals are as follows:

Sr.No.	IT(SS)A/ITA No.	Asstt. Year	Appeal by	Result
1-6.	IT(SS) A No.128 to 133/Ahd/2021	2009-10 To 2014-15	Revenue	The appeals of the Revenue are dismissed
7.	ITA No.1501/Ahd/2015	2011-12	Assessee	The appeal of the assessee is allowed.
8-9.	IT(SS)A No.181-182/Ahd/2021	2010-11	Revenue	The appeals of the Revenue are dismissed

Order pronounced in the Court on 19/05/2023 at Ahmedabad.

Sd/-
(MADHUMITA ROY)
JUDICIAL MEMBER

Sd/-
(WASEEM AHMED)
ACCOUNTANT MEMBER

(True Copy)

Ahmedabad; Dated19/05/2023

Manish

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त(अपील) / The CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण / DR, ITAT,
6. गार्ड फाईल / Guard file.

आदेशानुसार/BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt.Registrar)
आयकर अपीलीय अधिकरण, अहमदाबाद / ITAT, Ahmedabad